Supreme Court, U.S.
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No. 03 349

In The
Supreme Court of the United States

JACK THWEATT,
on behalf of himself and all others similarly situated,

Petitioner,

v.

ELECTRONIC DATA SYSTEMS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The respondent fired the petitioner as part of a forced ranking and termination process in which a disproportionate number of the respondent's employees receiving low rankings were at least 40 years old. The petitioner alleged that the rankings were not based on reasonable business factors but on an arbitrary model for categorizing employees. The court of appeals rejected the petitioner's claim on the ground that the Age Discrimination in Employment Act of 1967 "does not include liability for disparate impact claims." The question presented is:

Whether a disparate impact method of proving age discrimination is available to plaintiffs suing under the Age Discrimination in Employment Act of 1967.

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OPINIONS BELOW

The judgment of the court of appeals (App., *infra*, 1a-3a) is unreported, but is expressly based on the same court's earlier, reported decision in *Adams v. Florida Power*, 255 F.3d 1322 (CA11 2001), *cert. dismissed as improvidently granted*, 535 U.S. 228 (2002). The judgment of the district court (App., *infra*, 4a) is unreported.

JURISDICTION

The court of appeals entered its judgment on June 3, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 623(a) & (f)(1), 626(f)(1) are reprinted at App., *infra*, 6a-12a. The relevant portions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a)(2), are reprinted at App., *infra*, 12a-16a. The relevant portions of the Equal Pay Act of 1963, as amended, 29 U.S.C. § 206(d)(1), are reprinted at App., *infra*, 16a-17a.

STATEMENT

The petitioner, Jack Thweatt, was a 47-year-old EDS employee when he received a low ranking within his job code and was fired as part of a rolling reduction-in-force. App., *infra*, 21a-22a, 30a. He sought to assert disparate

impact age discrimination claims under the Age Discrimination in Employment Act of 1967 (ADEA) on behalf of a proposed class of older workers that EDS's ranking model had adversely affected. *Id.* at 22a-25a. The district court dismissed his complaint on the basis of the blanket rule in *Adams v. Florida Power*, 255 F.3d 1322 (CA11 2001), *cert. dismissed as improvidently granted*, 535 U.S. 228 (2002), that the ADEA does not under any circumstances permit disparate impact claims, App., *infra*, at 4a-5a, and the court of appeals affirmed on the same basis, *id.* at 2a-3a.

On writ of certiorari, *Adams* facially presented the Court an important federal question that had divided the circuits for a number of years—whether disparate impact claims are actionable under the ADEA. But the Court dismissed the writ as "improvidently granted" after an oral argument in which some members of the Court indicated the case might not be appropriate for deciding the disparate impact question because the *Adams* plaintiffs were challenging the general statistical result of a reduction-in-force, rather than a specific employment practice. For instance, Justice Ginsberg said: "[Y]ou don't come to us with any rule, standard, practice. You just say reduction in force." *Adams v. Florida Power*, 2002 WL 483467 *7 (oral argument transcript). The clear conflict among the circuits that preceded certiorari in *Adams* remains unresolved.

The petition in this case presents the same core legal question that *Adams* presented, but differs factually in one critical respect. The petitioner challenges a specific employment practice causing an adverse disparate impact on older workers: EDS's subjective and forced ranking model for categorizing its employees.

A. The ADEA: Its Language, Legislative History and Pre-*Hazen* Caselaw

Correct construction of the ADEA is aided by an understanding of its language, legislative history, and caselaw arising before *Hazen Paper Co. v. Biggins,* 507 U.S. 604 (1993)—as well as by the amendments to the ADEA imported through the Older Workers Benefit Protection Act of 1990 (OWBPA).

In a 1965 report submitted to Congress two years before enactment of the ADEA, the Secretary of Labor stated that "[t]o eliminate discrimination in the employment of older workers, it will be necessary not only to deal with overt acts of discrimination, but also to adjust those present employment practices which quite unintentionally lead to age limits in hiring." U.S. Department of Labor, Report to the Congress on Age Discrimination in Employment under Section 715 of the Civil Rights Act of 1964 (1965). Congress subsequently recognized that "older workers find themselves disadvantaged in their efforts to retain or regain employment, that arbitrary age limits and certain other practices may work to the disadvantage of older persons." H.R. Rep. No. 90-805, 90th Cong. 1st Sess. (1967). The ADEA was then enacted "as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflect[ing] a societal condemnation of invidious bias in employment decisions." *McKennon v. Nashville Banner Publishing Co.,* 513 U.S. 352, 357 (1995).

The express prohibitions of the ADEA make it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age,"

29 U.S.C. § 623(a)(1), or "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623(a)(2). As the Court has acknowledged, there "are important similarities between" the ADEA and Title VII of the Civil Rights Act, "both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions. In fact, the prohibitions of the ADEA were derived *in haec verba* from Title VII." *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). A noted statutory difference between the ADEA and Title VII, however, is that an action "otherwise prohibited" by the ADEA is permitted "where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1).

In 1971, the Court issued its opinion in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), to address arbitrary and systemic discrimination. Based on "the specific language of Title VII of the Civil Rights Act," *Jefferson v. Hackney*, 406 U.S. 535, 549 n.19 (1972), the Court in *Griggs* held that claims could proceed on the basis of a disparate impact model of proof where there was no evidence of intentional discrimination. 401 U.S. at 431-32. Although Title VII lacked the ADEA's "reasonable factors" provision, the Court held that an employer defending an otherwise adequate disparate impact case would prevail if it established that its challenged practice was based on "business necessity." *Id.* at 431.

Following *Griggs*, multiple courts applied the Title VII disparate impact model to ADEA cases.[1] The Department of Labor guidelines issued contemporaneously with the ADEA also suggested that age discrimination claims could be based on facially age-neutral employment actions. 29 C.F.R. § 860.103(f)(1) & (2) (1986); 29 C.F.R. § 860.104(b). And for the past 21 years the EEOC interpretive guidelines have indicated that the "reasonable factors" defense in the ADEA works with the business necessity defense in a disparate impact analysis. The guidelines provide that an employer may raise the "reasonable factors" defense to justify employment practices that "have an adverse impact on individuals within the protected age group." 29 C.F.R. § 1625.7(d).

In 1989, the Court issued an opinion in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659-60 (1989), that arguably reduced the burden of a disparate impact defendant in Title VII litigation with respect to showing "business necessity," from a burden of persuasion to a burden of production. *Wards Cove* said nothing, however, to suggest that disparate impact for Title VII or the ADEA did not *exist*, only that an employer's burden in justifying its actions was less than some courts had concluded. Courts thus continued to assume that disparate impact applied to

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[1] *See, e.g., Monroe v. United Air Lines*, 736 F.2d 394, 404 n.3 (CA7 1984), *cert. denied*, 470 U.S. 1004 (1985); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 690 (CA8 1983); *Allison v. Western Union Telephone Co.*, 680 F.2d 1318, 1321-22 (CA11 1982); *Douglas v. Anderson*, 656 F.2d 528, 531 n.1 (CA9 1981); *Geller v. Markham*, 635 F.2d 1027 (CA2 1980), *cert. denied*, 451 U.S. 945 (1981); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 315 (CA6 1975); *United Independent Flight Officers v. United Air Lines*, 572 F. Supp. 1494, 1505 (N.D.Ill. 1983).

ADEA cases. Steven Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229, 258-75 (1990) (discussing prevailing view in 1990).

Partially in response to *Wards Cove*, Congress codified what it considered the pre-*Wards Cove* version of the Title VII disparate impact theory in the Civil Rights Act of 1991. 42 U.S.C. § 2000e-2(k)(1)(A). "The 1991 Act, however, [left] unchanged the standards for a prima facie case." *Cota v. Tucson Police Dept.*, 783 F. Supp. 458, 472 n.14 (D.Ariz. 1992). Congress did not make any similar amendment to the ADEA. As Judge Posner recognized as late as 1992, however, "the weight of authority *** [was] that disparate impact [was] a viable doctrine under the age discrimination law." *Finnegan v. Trans World Airlines*, 967 F.2d 1161, 1163 (CA7 1992).

Congress amended the ADEA several times after *Griggs*.[2] Though it "is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change," *Lorillard v. Pons*, 434 U.S. at 580, Congress has never acted, however, to restrict or otherwise undermine disparate impact analysis in ADEA cases. *EEOC v. Governor Mifflin School District*, 623 F. Supp. 734, 740-41 (E.D.Pa.

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[2] *See, e.g.*, Age Discrimination in Employment Act Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (1986); Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9201, 100 Stat. 1874, 1973-75 (1986); Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 9201(b), 100 Stat. 82, 171 (1986); Older Americans Act Amendments of 1984, Pub. L. No. 98-459, § 802, 98 Stat. 1792 (1984).

1985). To the contrary, the 1990 Congress (post-*Wards Cove*) amended the ADEA by adding the OWBPA and requiring that employers provide employees fired in reductions in force with statistical information regarding the ages of co-workers offered severance pay (and of those co-workers who were not fired). 29 U.S.C. § 626(f)(1)(H)(ii), Pub. L. No. 101-433, 104 Stat. 978 (1990); *cf.* Richard C. Mariani and Kimberly E. Robertson, Article, *Age Discrimination Litigation: RIFs, Statistics and Stray Remarks*, 64 DEF. COUNS. J. 88, 92 (1997) ("While appropriate statistical evidence may be relevant in individual disparate treatment cases, it generally carries less probative weight in those cases than it does in disparate impact cases. This is because in disparate treatment cases the central focus 'is less whether a pattern of discrimination existed at the company and more how a particular individual was treated, and why.'") (citation and quotations omitted).

In 1993, the Court issued its opinion in *Hazen Paper* and suggested in *dicta* that the disparate impact method of proving discrimination available to Title VII plaintiffs might not be available to ADEA plaintiffs. Neither the majority's opinion, nor the concurrence, indicated that disparate impact was wholly unavailable to ADEA plaintiffs—only that Title VII's version of it might not be.

B. *Adams v. Florida Power*

The Eleventh Circuit's unreported decision in this case adopts the same court's earlier decision in *Adams v. Florida Power.* App., *infra*, 2a-3a. In *Adams*, the court held that the ADEA does not under any circumstances permit disparate impact claims, and based its decision upon four grounds. First, the ADEA's exception for "reasonable

factors other than age" does not exist in Title VII. *Adams*, 255 F.3d at 1325. Second, the court determined that the ADEA exception was similar to an exception in the remedial provisions of the Equal Pay Act (EPA), 29 U.S.C. § 206(d)(1)(iv), and that this Court had interpreted the EPA's exception to preclude disparate impact claims. 255 F.3d at 1325 n.6. Third, the court found that the legislative history of the ADEA was unlike the legislative history of Title VII because the Secretary of Labor's report preceding enactment of the ADEA "recommended that Congress ban arbitrary discrimination, such as disparate treatment based on stereotypical perceptions of the elderly, but that factors affecting older workers, such as policies with disparate impact, be addressed in alternative ways." *Id.* at 1325-26. Finally, the court stated that the decision in *Hazen Paper* suggested that no disparate impact claim could be brought under the ADEA. *Ibid.*

The court concluded:

> The Second Eighth, and Ninth Circuits allow disparate impact claims under the ADEA. The First, Third, Sixth, Seventh, and Tenth do not.[3] We find the reasoning of the Tenth Circuit * * * and the First Circuit * * * persuasive. Accordingly, we find that disparate impact claims may not be brought under the ADEA, and AFFIRM.

Ibid.

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[3] This is partially incorrect. As discussed *infra* at 13, the Third and Sixth Circuits have not held that the disparate impact method of proving age discrimination is unavailable under the ADEA.

C. The Allegations in this Case

The respondent, EDS, announced a "Performance Management Process" (PMP) in 2000, as a method for assessing and ranking employees. Complaint ¶33.[4] EDS used the PMP rankings to determine compensation and to select employees for termination in the company's rolling reduction-in-force. *Id.* at ¶¶3-4. Five categories were established for rankings, with Group 1 being the top and Group 5 being the bottom. *Id.* at ¶33. The rankings were bell-curved in that only 10% of the employees could be ranked in Group 1, 15% in Group 2, 50% in Group 3, 15% in Group 4 and 10% in Group 5. *Ibid.*

Under this version of the PMP, each EDS team leader ranked subordinates individually, then the supervisors met with their immediate superiors; supervisors and their superiors then debated contributions by each employee to attempt to ensure rankings correlated to job performance. Complaint ¶33. Although the rankings purported to group EDS employees by their contributions, abilities, and needs, the percentage of employees that EDS required be placed in each category was predetermined before the employees were reviewed by their supervisors. *Id.* at ¶37(A). So—regardless of an employees' *actual* contributions, abilities and needs—employees were forced into rankings to meet the pre-determined statistical needs of the rankings model. *Ibid.* The petitioner alleged that it was unreasonable to use this forced ranking model (*ibid.*)

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[4] Since the district court dismissed the complaint for failure to state a claim, the allegations are assumed true for purposes of this petition. A copy of the complaint is included in the appendix. App., *infra*, 18a-47a.

and that EDS could reasonably meet its business needs by having employees reviewed and then determining the size of the various categories into which employees should be placed (*id.* at ¶40).

In early 2001, EDS announced that the PMP was being revised. Complaint ¶34. Under the new PMP, older employees disproportionately tended to receive lower rankings and, thus, to be terminated in RIF implementations or, if not terminated, to receive less compensation for their level of employment.[5] *Id.* at ¶¶36,41. The petitioner has alleged that, in addition to continuing the forced ranking problem of the original PMP (*id.* at ¶40), the rankings from the new PMP were based on two related, unreasonable factors that made the rankings arbitrary.

The scores that employees received were based on criteria that were both subjectively weighed *and* weighted; each supervisor subjectively assigned the numerical *values* of the listed criteria based on that supervisor's individual impression of the importance of the criteria to the job—and then the supervisor reviewed each employee and assigned scores to those values.[6] Complaint ¶¶34-35,37(B).

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[5] Approximately 55% of employees were age 40 and older before the RIF, but almost 70% of employees terminated in the RIF were age 40 and older. Complaint ¶36. The complaint does not allege whether the original PMP had a disparate impact on older employees.

[6] A copy of Mr. Thweatt's assessment, which includes the standard instructions to reviewing supervisors, was an exhibit to the complaint and is therefore in the appendix. App., *infra*, 32a-47a. Although employee assessments included both scoring and the ranking grouping in one document, and the scoring and ranking *appeared* to be done by the same individual, they were actually done separately, with scoring done at the local level and ranking done at corporate headquarters. Complaint ¶35(C).

The scores that the PMP generated were thus not merely the result of subjectivity, but subjectivity squared, and the rankings based on those scores could vary substantially without a reasonable correlation to employee performance. *Id.* at ¶¶35,37(B).

Further compounding this subjectivity of the PMP, EDS ranked each individual against all the employees that shared that individual's job code throughout the national EDS organization, fitting the local scores into the predetermined ranking percentages. Complaint ¶¶34-35,37(B). Since there were no meaningful guidelines for local scoring, the resulting national rankings were arbitrary.[7] According to the petitioner, EDS should have, at least, pre-assigned the numerical values of the criteria that individual supervisors considered for a job code. *Id.* at ¶¶35,39.

REASONS FOR GRANTING THE PETITION

In *Hazen Paper,* the Court noted that it had never resolved the question whether disparate impact analysis is available to ADEA plaintiffs: "we have never decided whether a disparate impact theory of liability is available under the ADEA * * * and we need not do so here."[8] A clear division in the circuits ensued. As the Eleventh Circuit

[7] There was, for example, no way of knowing whether an employee in Tennessee receiving a review score that caused him to rank in the third category nationally was performing at the level of an employee in California within the same job code whose score placed him in the lowest category. Complaint ¶37(B).

[8] 507 U.S. at 609-11.

acknowledged in *Adams*, its post-*Hazen* decision conflicts with the post-*Hazen* decisions of the Second, Eighth and Ninth Circuits—and aligns the court with the First, Seventh and Tenth Circuits. That split in authority persists and will continue to do so without this Court's intervention.

I. The Court of Appeals' Interpretation of the ADEA Expressly Conflicts with the Second, Eighth, and Ninth Circuits' Interpretation and Exacerbates an Existing Conflict in the Circuits

It is hard to conceive of a case presenting a clearer conflict in the circuits. In short, the decisions of the Second, Eighth and Ninth Circuits conflict with the decisions of the First, Seventh, Tenth and Eleventh Circuits: ***Compare*** *Criley v. Delta Air Lines,* 119 F.3d 102, 105 (CA2 1997) ("Although the Supreme Court has never decided whether a disparate impact theory of liability is available under the ADEA, [*Hazen*, 507 U.S. at 610], in our circuit, we have recognized such an action."); *EEOC v. McDonnell Douglas*, 191 F.3d 948, 950 (CA8 1999) ("While several of our sister circuits have held that the ADEA cannot support claims based on disparate impact * * * the law of this circuit is that disparate-impact claims are cognizable under the ADEA"); and *Frank v. United Airlines,* 216 F.3d 845, 856 (CA9 2000), *cert. denied*, 532 U.S. 914 (2001) ("We have since [*Hazen Paper*] squarely decided that a disparate impact claim is cognizable in an ADEA case.* * * [W]e again hold that a disparate impact claim is cognizable under the ADEA"), ***with*** *Mullin v. Raytheon Co.,* 164 F.3d 696, 700-01 (CA1 1999), *cert. denied,* 528 U.S. 811 (1999) (the Title VII disparate impact model announced in

"*Griggs* is inapposite in the ADEA context"); *Blackwell v. Cole Taylor Bank*, 152 F.3d 666, 672 (CA7 1998) ("disparate impact is not, at least in this circuit, a permissible theory of violation of the ADEA"); *Ellis v. United Airlines*, 73 F.3d 999, 1006-07 (CA10 1996), *cert. denied*, 517 U.S. 1245 (1996) ("disparate impact claims are not cognizable under the ADEA"); and *Adams*, 255 F.3d at 1326 ("we find that disparate impact claims may not be brought under the ADEA"). Thus three circuits have expressly held that the disparate impact method of proving age discrimination is available in ADEA cases, and four circuits have expressly held that the disparate impact method is not available in ADEA cases.

As for the remaining circuits, the Court of Appeals for the District of Columbia has so far assumed without deciding that disparate impact is available under the ADEA. *Koger v. Reno*, 98 F.3d 631, 639 (CAD.C. 1996). Judge Greenberg of the Third Circuit has independently opined that "it is doubtful that *traditional* disparate impact theory is a viable theory of liability under the ADEA." (opinion of Greenberg, J.) (emphasis added), *DiBiase v. SmithKline Beecham*, 48 F.3d 719, 732 (CA3 1995), *cert. denied*, 516 U.S. 916 (1995). The Sixth Circuit suggested in *Lyon v. Ohio Educ. Ass'n and Prof'l Staff Union*, 53 F.3d 135, 139 n.5 (CA6 1995), that disparate impact claims under the ADEA may no longer be viable in that court: "There is considerable doubt as to whether a claim of age discrimination may exist under a disparate-impact theory * * *. However, this circuit has stated that a disparate-impact theory of age discrimination may be possible." The Fourth and Fifth Circuits have not yet addressed the issue.

"The lower courts have split on the issue. Unless clarification is brought to this area of the law, ADEA plaintiffs seeking to challenge an age-neutral employment practice adversely affecting older workers will have different results based merely upon the federal circuit in which their suit is brought." Nathan E. Holmes, Comment, *The Age Discrimination In Employment Act Of 1967: Are Disparate Impact Claims Available?,* 69 U. CIN. L. REV. 299, 300 (2000) (footnotes omitted). To resolve whether disparate impact is an available method of proving age discrimination under the ADEA, the Court should grant certiorari.

II. The Decision of the Court of Appeals is Incorrect

A. The ADEA expressly permits claims that are not based on an employer's intent. Section 4(a)(1) of the Act concerns any actions that an employer takes because of an individual employee's age:

> It shall be unlawful for an employer * * * to fail or refuse to hire or to discharge any individual *or otherwise discriminate against any individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

29 U.S.C. § 623(a)(1) (emphasis added). The catchall prohibition is "or otherwise discriminate against any individual."

In contrast, Section 4(a)(2) concerns macro actions that an employer takes toward his employees if the "way" those actions are taken would "tend" to adversely affect an individual because of the individual's age:

> It shall be unlawful for an employer * * * to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities *or otherwise adversely affect* his status as an employee, because of such individual's age.

29 U.S.C. § 623(a)(2) (emphasis added). Section 4(a)(2) thus does not turn on—or even include—the word "discriminate." It is a result-oriented prohibition, in which the catchall speaks only of adverse "affect."

There has, however, been some debate over whether the phrase "because of such individual's age" applies to the employer's actions, in which case Section 4(a)(2) arguably requires intent, or whether that phrase applies to the tendency toward the adverse affect from those actions, in which case Section 4(a)(2) does not. *See, e.g.*, Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837, 842-43 (1982) (arguing for intent). But a proper grammatical analysis of the statute demonstrates that the phrase "because of such individual's age" *cannot* apply to an employer's actions—unless Congress confused singular with plural, as a pro-intent reading of Section 4(a)(2) would require:

> It shall be unlawful for an employer * * * to limit, segregate, or classify his *employees* [because of such *individual's* age] in any way which would deprive or tend to deprive any *individual* of employment opportunities or otherwise adversely affect *his* status as *an* employ*ee*, because of such *individual's* age.

29 U.S.C. § 623(a)(2) (emphasis added). As written by Congress, there is no "individual" preceding "limit, segregate, or classify his employees." The necessary pro-intent

insertion of the phrase "because of such *individual's* age" after "classify his employees" thus does violence to the language of the ADEA. The only coherent reading of Section 4(a)(2) is:

> It shall be unlawful for an employer * * * to limit, segregate, or classify his *employees* in any way which would deprive or tend to deprive any *individual* of employment opportunities [because of such *individual's* age] or otherwise adversely affect *his* status as *an* employee, because of such *individual's* age.

Ibid (emphasis added). Unless Congress made a significant drafting mistake, this provision does not require intent, and disparate impact claims should be permitted under the ADEA.

B. The requirement of reasonableness in the "reasonable factors other than age" defense only makes sense if disparate impact liability exists under the ADEA. Section 4(f)(1) permits an employer to take action that would be "otherwise prohibited * * * where the differentiation [between younger and older workers] is based on *reasonable* factors other than age." 29 U.S.C. § 623(f)(1) (emphasis added). There are two reasons why this provision *cannot* apply to disparate treatment claims. First, under disparate treatment analysis, the "employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." *Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1187 (CA11 1984). Second, an employer only engages in prohibited intentional age discrimination by knowingly treating an older worker adversely, based on the factor of age. So if an employer's "otherwise prohibited" action is intentional

discrimination, that action cannot satisfy the "reasonable factors other than age" component of Section 4(f)(1).

To give Section 4(f)(1) meaning, the ADEA must prohibit unintentional differentiations between younger and older workers, and then excuse those differentiations if they are based on reasonable factors. As Dean Player has explained:

> If age motivated the employer's action, [the prohibition] establishes prima facie liability. Now turning to [the reasonable factors exception]; it allows the action if the factor used is "reasonable" and "other than age." There is no way [the exception] could ever have an application if [the prohibitions of the ADEA are] limited to motivated decision making. If [the prohibition does] not extend beyond age motivation, there would be no need to have [the exception] because age motivated decisions could not possibly be for reasons other than age. The only way for [the exception] to have structural validity is to recognize that [the prohibition] can be violated by non-age or age-neutral factors. At this point, [the exception] would allow the employer to establish the defense that the challenged device was both neutral in terms of intent and was "reasonable."

Mack A. Player, *Wards Cove Packing or Not Wards Cove Packing? That is Not The Question: Some Thoughts on Impact Analysis Under The Age Discrimination in Employment Act,* 31 U. RICH. L. REV. 819, 833-834 (1997). Under this analysis, every word in the ADEA provisions at issue is given effect—including the words *reasonable* and *otherwise prohibited*.

C. In *Griggs*, the Court held that language identical to Section 4(a)(2) permitted plaintiffs to proceed with

disparate impact claims. *Griggs*, 401 U.S. at 431. Some arguments against permitting disparate impact claims under the ADEA center on a belief that *Griggs* was *not* based on the language of Title VII. But the Court contemporaneously explained in *Jefferson v. Hackney*, 406 U.S. 535, 549 n.19 (1972), that *Griggs* was indeed based on "the specific language of Title VII of the Civil Rights Act." Although the Court relied in part on historical racial animus in *Griggs*, the Court has subsequently held that disparate impact applies to gender discrimination, *Dothard v. Rawlinson*, 433 U.S. 321 (1977), even though Congress' 11th hour inclusion of sex in Title VII does not suggest that Congress considered historical animus against women in passing the Act. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 n.9 (1989). Because the ADEA contains the same language that the Court has construed to permit disparate impact claims, disparate impact claims should be permitted under the ADEA.

D. To detect and address subconscious stereotypes, disparate impact liability should exist under the ADEA as it does under Title VII. "[T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 987 (1988). Designed to combat "inaccurate and stigmatizing stereotypes," *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993), "the ADEA broadly prohibits arbitrary discrimination in the workplace based on age." *Lorillard v. Pons*, 434 U.S. 575, 577 (1978); *see also EEOC v. Wyoming*, 460 U.S. 226, 231 (1983) (age discrimination "based in large part on stereotypes"). Where, as here, an employer's method of classifying employees is so subjective as to be arbitrary, disparate

impact analysis is necessary to police "subconscious stereotypes and prejudices." *Watson*, 507 U.S. at 990.

III. The Question Presented is Important

There is a plethora of scholarly views regarding whether and when disparate impact analysis is applicable to the ADEA.[9] A number of post-*Hazen* writers agree on *one* topic, however: The Court should resolve the issue. As one writer observed:

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[9] For arguments favoring disparate impact liability under the ADEA, see Brett Ira Johnson, Note, *Six of One, Half-Dozen of Another: Mullin v. Raytheon Co. as a Representative of Federal Circuit Courts Erroneously Distinguishing The ADEA From Title VII Regarding Disparate Impact Liability*, 36 IDAHO L. REV. 303 (2000); Jennifer J. Clemons and Richard A. Bales, Article, *ADEA Disparate Impact in The Sixth Circuit*, 27 OHIO N.U. L. REV. 1 (2000); Nathan E. Holmes, Comment, *The Age Discrimination In Employment Act Of 1967: Are Disparate Impact Claims Available?*, 69 U. CIN. L. REV. 299 (2000); Mack A. Player, Note, *Wards Cove Packing or Not Wards Cove Packing? That is Not The Question: Some Thoughts on Impact Analysis Under The Age Discrimination in Employment Act*, 31 U. RICH. L. REV. 819 (1997); Jonas Saunders, Note, *Age Discrimination: Disparate Impact Under the ADEA after Hazen Paper Co. v. Biggins: Arguments in Favor*, 73 U. DET. MERCY L. REV. 591 (1996); Michael C. Sloan, *Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?*, 1995 WIS. L. REV. 507 (1995); Marla Ziegler, Note, *Disparate Impact Analysis and the Age Discrimination in Employment Act*, 68 MINN. L. REV. 1038 (1984); *cf.* David E. Mitchell, Comment, *Recent Cases Affecting The Role of The ADEA in Protecting Older Workers*, 39 DUQ. L. REV. 437 (2001). *But see* Brendan Sweeney, Comment, *Downsizing the Age Discrimination in Employment Act: The Availability of Disparate Impact Liability*, 41 VILL. L. REV. 1527 (1996); Evan H. Pontz, Comment, *What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. REV. 267 (1995); Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837 (1982).

> Since *Hazen*, several courts of appeal have reconsidered the validity of a disparate impact claim under the ADEA. Some have reversed prior rulings, which had allowed for ADEA disparate impact claims, while others have refused to do so without a clear directive from the Supreme Court. The Supreme Court has denied petitions for a writ of certiorari on the issue several times, leaving lower courts to speculate regarding the appropriateness of disparate impact under the ADEA.

Six of One, Half-Dozen of Another: Mullin v. Raytheon Co. as a Representative of Federal Circuit Courts Erroneously Distinguishing The ADEA From Title VII Regarding Disparate Impact Liability, 36 IDAHO L. REV. at 316-17. Another commentator urged:

> The intercircuit split on the issue of whether disparate impact claims should be recognized under the ADEA is a significant one. Its resolution has the potential to increase or reduce the number of successful ADEA claims. The ability to use a disparate impact theory as a basis for ADEA claims is important to plaintiffs who have difficulty obtaining direct or even circumstantial evidence of age discrimination.

Recent Cases Affecting The Role of The ADEA in Protecting Older Workers, 39 DUQ. L. REV. at 455. And still others have put it this way:

> Faced with no clear guidance from the Supreme Court and the mix of opinions of the various appellate courts, lower courts and legal commentators continue to struggle with the issue.

* * *

> [T]he authors believe that it is important that the Supreme Court provide immediate guidance to the lower courts regarding the viability of the disparate impact theory under the ADEA.

ADEA Disparate Impact in The Sixth Circuit, 27 OHIO N.U. L. REV. at 2, 18; *see also Wards Cove Packing or Not Wards Cove Packing? That is Not The Question: Some Thoughts on Impact Analysis Under The Age Discrimination in Employment Act*, 31 U. RICH. L. REV. 819 ("the new division between circuits makes the issue ripe for Supreme Court resolution"); Erwin Chemerinsky, *Can Plaintiffs Make Disparate-Impact Claims in Age Discrimination Cases?*, 38 TRIAL 72 (May 2002) ("Although *Adams* was dismissed, the issue remains, and the Court will need to address it in another case in the near future.").

While there may be, as the *Hazen* concurrence stated, "substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA," the issue is far from a dead letter. The time has come for the Court to resolve whether disparate impact analysis is appropriate in ADEA litigation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-10047
Non-Argument Calendar

D.C. Docket No. 02-02286-CV-S-S
(Filed June 3, 2003)

JACK THWEATT, on behalf
of himself and all others
similarly situated,

Plaintiff-Appellant,

versus

ELECTRONIC DATA SYSTEMS
CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Alabama

(June 3, 2003)

Before CARNES, WILSON and KRAVITCH, Circuit Judges.

PER CURIAM:

Jack Thweatt, Jr., appeals the district court's dismissal pursuant to Fed.R.Civ.P. 12(b)(6) of his disparate impact age discrimination action against Electronic Data Systems Corporation ("EDS"). Thweatt filed his complaint under the Age Discrimination in Employment ACT ("ADEA"), 29 U.S.C. § 621 *et seq*, on behalf of a putative

class of employees alleging that EDS's performance managing process had a disparate impact on older employees. Specifically, he claimed that (1) the system for ranking employee's performance and allocating compensation was subjective, (2) employees over age forty received lower scores, and (3) based on these evaluations, older employees accounted for seventy percent of the company's reduction-in-force.

The district court dismissed the complaint for failure to state a claim, finding that it was bound by this court's decision in *Adams v. Florida Power Corp.*, 255 F.3d 1322 (11th Cir. 2001), *cert. dismissed,* 535 U.S. 228 (2002), which held that disparate impact claims were not cognizable under the ADEA.

We review a district court's grant of a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) de novo, accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff. *Shands Teaching Hosp. and Clinics, Inc. v. Beech St. Corp.*, 208 F.3d 1308, 1310 (11th Cir. 2000).

On appeal, Thweatt argues that this court should reconsider its holding in *Adams*. Reviewing Congressional history leading to the passage of the ADEA and the Older Workers Benefit Protection Act of 1990 ("OWPBA"), Thweatt contends that Congress intended to include disparate impact claims, as evidenced by the statutory language "because of age" and the Department of Labor guidelines suggesting that facially-neutral employment actions could be covered by the ADEA. He claims that the similarities between Title VII and the ADEA clarify that disparate impact claims should be available under the ADEA.

"[I]t is the firmly established rule of this Circuit that each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled en banc, or by the Supreme Court." *In re Commissioner's Subpoenas*, 325 F.3d 1287, 1306 (11th Cir. 2003); *Smith v. GTE Corp.*, 236 F.3d 1292, 1300 n. 8, 1302-03 (11th Cir. 2001). Because this court has held that the ADEA does not include liability for disparate impact claims, *Adams*, 255 F.3d at 1326, and this holding has not been overruled by this court en banc or by the U.S. Supreme Court, we are bound by the holding in *Adams*. *In re Commissioner's Subpoenas*, 325 F.3d at 1306. Accordingly, we **AFFIRM** the judgment of the district court.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JACK THWEATT, JR., Plaintiff,	)	
vs.	)	Civil Action No. CV-02-S-2286-S
ELECTRONIC DATA SYSTEMS CORPORATION, Defendant.	)	

ORDER

(Filed Dec. 8, 2002)

Plaintiff, Jack Thweatt, Jr., on behalf of himself and all others similarly situated, brings a single claim against defendant, Electronic Data Systems Corporation; specifically, that defendant's method of reducing its workforce through an employee ranking process has a disparate impact on employees aged 40 and older, in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq.* Defendant has moved this court to dismiss plaintiff's claim on the ground that, in the Eleventh Circuit, "disparate impact claims may not be brought under the ADEA." *Adams v. Florida Power Corp.*, 255 F.3d 1322, 1326 (11th Cir. 2001). Plaintiff appears to agree with defendant's analysis, stating in his memorandum of law in opposition to defendant's motion that, "[g]iven the Eleventh Circuit's decision in *Adams*, the Plaintiff

anticipates that this Court will dismiss the Complaint in this case with prejudice."[1]

Upon consideration of the pleadings, motion, and briefs, the court has determined that it would not be aided by oral argument. Accordingly, the Clerk is directed to remove this action from the motion docket scheduled to begin at 10:45 o'clock a.m. on Tuesday, December 17, 2002.

In view of the binding precedent cited above, defendant's motion to dismiss is GRANTED, and plaintiff's claim is dismissed with prejudice.

Costs are taxed to plaintiff. The Clerk is directed to close this file.

DONE this 6th day of December, 2002.

/s/ Lynwood Smith
United States District Judge

[1] Plaintiff explains that he intends to pursue "a good faith challenge to the law of the Eleventh Circuit." In view of the recent vintage of the Eleventh Circuit's decision in *Adams*, July 5, 2001, this court wishes him good luck in that endeavor.

29 U.S.C. § 623 Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

* * *

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization –

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation

controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section –

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan –

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under *section 1625.10, title 29, Code of Federal Regulations* (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the

burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

* * *

(l) Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section –

(1) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because –

(A) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(B) a defined benefit plan (as defined in section 1002(35) of this title) provides for –

(i) payments that constitute the subsidized portion of an early retirement benefit; or

(ii) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (*42 U.S.C. 401* et seq.), and that do not exceed such old-age insurance benefits.

(2)(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age –

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii);

are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

* * *

29 U.S.C. §626 Recordkeeping, investigation, and enforcement

* * *

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum –

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph

(F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to –

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum –

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No

waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

* * *

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42 U.S.C. § 2000e-2(a)(2)

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any

individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and

(2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

* * *

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of

production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

* * *

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if –

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described

in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (*21 U.S.C. 802(6)*), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [*21 U.S.C. § 801* et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

* * *

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29 U.S.C. §206(d) Prohibition of sex discrimination

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to

(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JACK THWEATT, JR. on behalf of himself and all others similarly situated,

Plaintiff,

v.

ELECTRONIC DATA SYSTEMS CORPORATION,

Defendant.

CLASS REPRESENTATION

CASE NO.: CV-02-H-2286-NE

COMPLAINT

(Filed Sep. 17, 2002)

The Plaintiff, Jack Thweatt Jr., sues the Defendant, Electronic Data Systems Corporation (EDS), on behalf of himself and all others similarly situated:

JURISDICTION, VENUE, PARTIES and OVERVIEW

1. This is an action for damages under the Age Discrimination in Employment Act of 1967, as amended ("ADEA").

2. EDS is a corporation doing business in Hoover, Alabama. It was founded in 1962 and is presently the leading information technology (IT) services company in the world. EDS employs over 140,000 employees in 60 countries, and had revenues of over $21 billion in 2001

(almost 40% in the US). In the words of its chairman in EDS's 2001 report to shareholders:

> EDS grew in a time of economic decline. Your company became known as the business that keeps other businesses working. 2001 was not easy – few years are. The trust of our clients . . . our trust in each other . . . made the difference. In 2001, EDS became a $21 billion company. We enter our 40th year with:
>
> - Record revenues
> - Five consecutive quarters of base (non-GM) organic revenue growth at or above the market rate
> - Our first full year of double-digit operating margin since 1995
> - Comparable year-over-year, double-digit earnings-per-share growth
>
> For EDS, 2001 was successful and prosperous. Our backlog – business signed but not yet delivered – was greater than four times current year revenue. No competitor could make this claim.
>
> Our revenues of $21.5 billion were the highest they have ever been. We were among *Fortune* magazine's top 50 wealth-creating companies in the United States. We're proud of our financial strength. EDS maintains a high investment grade, long-term debt rating – one of the highest in our industry. Your company ended the year with a stronger balance sheet while supporting a significant surge in business growth. This rock-solid financial strength is the foundation of our success, and we're confident we can sustain it.

3. Despite its overwhelming success, EDS has been quietly terminating numerous U.S. employees as part of a rolling Reduction-In Force (RIF) that it is implementing through an employee review and ranking process called the "Performance Management Process" (PMP or "the Process") that ranks employees into one of five categories. EDS has explained the basis for the RIF to its terminated employees: "As a result of cost reduction activities, EDS has consolidated or eliminated certain functions making it necessary to reduce the size of our workforce."

4. The purported purpose of the Process is to rank individual performance and associate that rank to a "Pay for Performance" compensation policy. In actuality, the predominant purpose of the Process is to terminate employees in ensuing implementations of the RIF. The ranking also determines whether or not an individual receives a pay increase and, if so, establishes timeframes between increases and the percentage thereof. Additionally, employees ranked in the fifth, or lowest, category are considered to have demonstrated a performance problem requiring remediation.

5. The Process violates the ADEA because, as alleged below, it adversely and disparately impacts EDS's workers age 40 and over, and is based on arbitrary considerations rather than reasonable business factors.

6. The Plaintiff is a citizen of the United States and of the State of Alabama; at the time of the alleged discriminatory conduct, he was employed by EDS, working at 1876 Data Drive, Hoover, Alabama (BellSouth Birmingham Data Center).

7. The Plaintiff began his employment with EDS in 1997.

8. In January 1999 Richard Brown was named chairman and chief executive officer of EDS.

9. From 1997 until March 1999, Plaintiff was a team leader working closely with his manager on the Process; from March 1999 until October 2001, Plaintiff was a manager administering the Process. The Plaintiff was thus familiar with the Process.

10. In October 2001, the Plaintiff asked EDS to replace him as a manager and move him into the "Security Group."

11. The Plaintiff's transfer request was based on health problems linked to his stress level within EDS; he also recognized a need for an individual to take on the role in the Security Team that he proposed in his request because the Security Team – like numerous other EDS teams – was severely understaffed. The request was granted in October 2001.

12. Following his transfer, the Plaintiff was working in the EDS-BellSouth Account's Distributed Systems Management Center (DSMC) as an Infrastructure Specialist leading and managing projects encompassing a Windows NT Server Data Security Audit Compliance initiative, deployment of Quota File Sentinel (a Windows NT server add-on for disk capacity management), developing an "end to end" server build process for the center, and serving in the capacity of team member for the DSMC's Operations and Support Services' Security Team.

13. On January 31, 2001, EDS terminated the Plaintiff's employment without cause as part of the rolling implementation of its RIF; the Plaintiff was 47 years old.

14. From the date of the Plaintiff's employment by EDS, until December 2001, the Plaintiff's performance ranking had always been satisfactory or better.

15. In December 2001, the Plaintiff was ranked in the fifth, *i.e.*, worst, category, and he was selected for termination in the January 2002 implementation of the RIF based on his December 2001 ranking. (His assessment was performed in October 2001, but his ranking was either not completed, or not disclosed to the Plaintiff, until approximately mid-December 2001; a copy of the assessment and his ranking category is attached).

16. The Plaintiff timely filed a charge of age discrimination with the EEOC, subsequently received an EEOC Notice of Right to Sue, and filed this Complaint within 90 days of receipt of that Notice.

CLASS ACTION ALLEGATIONS

17. This is a class action brought by the Plaintiff on his own behalf and on behalf of others similarly situated.

18. The class the Plaintiff purports to represent is defined as:

> All salaried EDS employees and former employees who were ranked against employees in their job code in 2001 and later at the age of 40 or older, and who as a result of "Performance Management Process" rankings (a) were terminated without cause as part of EDS's reduction-in-force program; (b) had their pay reduced or not raised; or (c) otherwise suffered adverse employment action in their compensation or terms of employment.

19. The class exceeds 1000 members and is so numerous that joinder of all members is impracticable.

20. EDS's actions alleged in this Complaint are applicable to all members of the class.

21. The Plaintiff has no interest antagonistic to other members of the class.

22. The Plaintiff can adequately represent the interest of other members of the class.

23. The Plaintiff's claims are typical of claims of other members of the class who are subject to the same deprivation of their rights by the defendant as hereinafter alleged.

24. The prosecution of separate actions by individual members of the class would be impracticable because:

A) Inconsistent adjudications regarding individual members of the class would establish incompatible standards of conducts for the defendant, whose actions apply generally to any and all members of the class; and

B) Adjudications with respect to individual members of the class would be dispositive of the interest of other members not parties to the suit, since defendants' actions apply generally to any and all members to the class.

25. There are questions of law or fact common to the members of the class that predominate over questions only affecting individual members, including

A) whether the disparate impact method of proving discrimination is available under the ADEA;[1]

B) whether the Process had a significant and adverse disparate impact upon salaried workers age 40 and older within EDS who were ranked by job code; and

C) whether the Process' alleged adverse disparate impact upon older workers within EDS was based on reasonable business factors.

26. Questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy since the individual members were deprived of essentially the same rights by EDS's actions, and differ only in collateral aspects of their factual situations.

27. The claims of the representative party are typical of the claims of the class, and the representative party will fairly and adequately assert and protect the interests of the class.

---

[1] The Plaintiff is aware of *Adams v. Florida Power Corp.*, 255 F.3d 1322 (11th Cir. 2001), *cert. granted*, 122 S.Ct. 643 (2001), *cert. dismissed as improvidently granted*, 122 S.Ct. 1290 (2002), in which the Eleventh Circuit held that disparate impact was not available under the ADEA, the Supreme Court granted certiorari to resolve the circuit split on the issue, and the Supreme Court subsequently dismissed the writ as improvidently granted. The Plaintiff seeks to preserve his and the proposed Class's right to assert disparate impact claims if the Supreme Court revisits the issue again during the pendency of this case, or to seek Supreme Court review in a good faith challenge to the law of the Eleventh Circuit.

28. The maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

VIOLATION OF THE ADEA

29. EDS is an employer within the meaning of §11(b) of the ADEA, 29 U.S.C. §630(b).

30. For approximately the past two years, EDS has been conducting a rolling RIF, which it is implementing through a selection process largely based on employee rankings.

31. EDS workers are currently ranked into one of five categories and then compensated, and terminated in implementations of the RIF, based upon their rankings.

32. Prior to 2000, EDS performance reviews were based on four quartiles and each supervisor (internally called a "leader") was tasked with ranking his subordinates into each quartile with stipulations on the number of people to be placed into each quartile; there was no formal process or management tool and the rankings were at the leader's discretion.

33. In 2000, EDS announced its Performance Management Process (PMP), which was a methodology for assessing and ranking employees.

A) Five groups were established, with group 1 being the top performers and group 5 being the lowest.

B) The rankings were bell curved in that only 10% of the employees could be ranked in

group 1, 15% in group 2, 50% in group 3, 15% in group 4 and 10% in group 5.

C) Group 5 performers were either new to their position or were on an official Performance Improvement Plan due to poor performance.

D) The performance review consisted of three parts, with parts one and two comprising 50% and part three the other 50%; part 1 was based on "Shared Skills" or skills that all employees in EDS were deemed to have, part 2 was based on "Job Specific Skills", those skills directly related to job and job code, and part 3 was based on "Objectives" that were jointly established earlier in the year with an employee's leader.

E) Each skill or objective was assigned an "Importance", or weight factor, and a score. After each employee was reviewed, points were calculated and the employees were ranked accordingly. Each leader ranked his team individually, then supervisors met as a group with their directors and reviewed their lists; as a team, they debated contribution by each employee to attempt to ensure EDS' rankings correlated to job performance. This was not a difficult task because the members of the ranking teams were all in the same locale.

F) The rankings then left the area of the EDS organization where they were made and moved up to an EDS "Senior Director"; however the employees were ranked among their peers, within their local organization (of, *e.g.*, approximately 80 people, who might be physically located in multiple states).

34. In early 2001, EDS announced the PMP was being revamped. Rather than being ranked among their geographic peers, numerous employees were to be subjectively ranked among persons in their job codes throughout EDS based on criteria that were subjectively weighted by individual supervisors.

35. The Process was flawed for a variety of reasons:

A) EDS workers were subjectively reviewed on a local basis by their respective different EDS supervisors, who were located in different locations. The subjective reviews reduced the thousands of individual employees' performances to numerical scores within job codes, but the numerical value assigned to criteria leading to the score of each employee was subjectively assigned by different supervisors based on that supervisor's impression of the importance of the criteria to the job. EDS did not restrict its rankings of the employees based on those reviews to a comparison against those within a given local organization, and EDS did not require that the supervisors subjectively reviewing the employees within a given job code meaningfully confer to standardize the rankings that resulted from their reviews. Instead, EDS ranked its employees within the same job codes against one another based on subjective reviews and criteria – regardless of the location of the employee and the variability of the different supervisors' subjective perceptions.

B) Since there were no meaningful guidelines as to the range of scores to be assigned, rankings based on scores (even between leaders in

the same local organization) could vary substantially without a reasonable correlation to employee performance. (A copy of the Plaintiff's assessment, which includes the standard instructions to reviewing supervisors, is attached).

C) After the local managers reviewed and scored the individuals on their teams, the scores were submitted up the corporate ranks and returned with the ranking groupings; so employees received assessments from their managers that included both scoring and the ranking grouping in one document, though the scoring and ranking were not done by the same individual.

D) Organizationally, there were numerous delays in getting information to leaders and there was considerable confusion in establishing objectives; when reviews were ultimately conducted they were done on a rushed and haphazard basis.

36. The Process disparately impacted workers age 40 and older within EDS adversely, as they tended to receive lower rankings in the PMP and thus receive lower compensation for their level of employment, and be terminated in RIF implementations, substantially disproportionate to their presence within the company. For example, it is estimated that less than 55% of employees were age 40 and older before the RIF, but that almost 70% of employees terminated in the RIF were age 40 and older.

37. The Process was not based upon reasonable business factors but upon arbitrary considerations:

A) The rankings used in the Process supposedly grouped EDS employees by their contributions, abilities and needs, but the percentage of employees that EDS required to be placed into each category was actually predetermined before the employees were subjectively reviewed by their supervisors; so – regardless of an employees' *actual* contributions, abilities and needs – employees were placed into categories to meet the predetermined statistical needs of the rankings model, not the needs of EDS

B) Since EDS workers were subjectively reviewed and scored by their respective different EDS supervisors applying subjectively varying *criteria*, but ranked on a national basis against other employees located in different locations (who were themselves reviewed by different supervisors), the resulting rankings were wholly arbitrary; there was, for example, no way of knowing whether an employee in Tennessee receiving reviews that resulted in being placed within the third ranking category nationally was performing at the level of an employee in California within the same job code whose review resulted in placement in the lowest ranking category.

38. Given that prior to 2001, EDS ranked its employees against employees in the same location so that supervisors were conducting a more apples-and-apples comparison, a more reasonable methodology of ranking employees was obviously quite possible. To the extent EDS has any interest in company-wide uniformity, that interest can be more reasonably protected by assessment of general output from various localities and assessment of individual output within localities.

39. Rather than have individual supervisors subjectively assign the weight for the various criteria by which employees are ranked against one another (as the attached assessment reflects), it would be more reasonable for EDS to pre-assign the weights of the criteria for either all EDS employees or, at least, all EDS employees within a ranking group.

40. Rather than place employees into categories to meet the pre-determined statistical needs of the rankings model, it would be far more reasonable (and not burdensome), for EDS to meet its legitimate business needs by having employees reviewed and then determining the size of the various categories into which employees should be placed. Such a methodology would help ensure that EDS was actually selecting employees for adverse treatment based on rankings that reflected their performance rather than (as happened) selecting employees who had been arbitrarily placed into low-ranking categories to fulfill the pre-set number of employees for that category.

41. The EDS Process alleged in this Complaint deprives or tends to deprive individuals of employment opportunities because of their age, or otherwise adversely affects individuals' status as employees because of their age.

42. At all times pertinent to this lawsuit, EDS has known or reasonably should have known and understood that its employment decisions were subject to the provisions of the Age Discrimination in Employment Act.

43. Along with the members of the Class, the Plaintiff received a low ranking and was [sic] then received adverse employment action as part of the Process; they have been discriminated against because of age in violation of the ADEA.

44. As a direct result of the adverse treatment experienced in connection with the Process, the Plaintiff and the class members have experienced and will continue to experience economic damages including loss of merit increases, performance bonuses, stock options, wages, future wages, level of retirement benefits, earning capacity, and other losses associated with termination of employment, which are continuing in nature.

WHEREFORE, the Plaintiff requests:

A) Certification of the proposed Class.

B) Judgment against EDS for compensatory damages, including back pay for any and all damages Plaintiff and the Class may have suffered in loss of earning and benefits of the employment relationship, with interest, and front pay.

C) Judgment against EDS for liquidated damages.

D) Judgment against EDS for costs, attorney's fees and any other relief to which the Plaintiff and the Class are entitled.

E) Trial by jury on all issues so triable.

DATED this 17th day of September 2002.

/s/ Patrick J. Ballard
Patrick J. Ballard
BALLARD LAW OFFICE
205 20th St. N., Ste. 629
Birmingham, AL 35203
TELE: (205) 321-9600

EXHIBIT A

[The copy of this form filed with the District Court erroneously included Mr. Thweatt's handwritten notes to counsel, which have been omitted in printing.]

EDS Performance Assessment

EDS Performance Assessment 2001

Name of Person Being Assessed	JACK THWEATT
Date of Assessment	10/16/2001
Job Family	Technical Delivery
Job Code/Title	12210 Tech Dlvry Team Manager
Organization/Team Name	DISTRIBUTED SYSTEMS MGMT. CTR. 237923
Strategic Unit Number	237923
Country Code	United States
Name of Supervisor/ Manager	THOMAS SPRINGER

The EDS Performance Differentiator (Tool) is used by EDS Leaders to assess and differentiate the performance of EDS employees. The information contained herein is not intended to alter the pre-existing terms of employment between an employee and EDS, or to grant additional rights or privileges to employees.

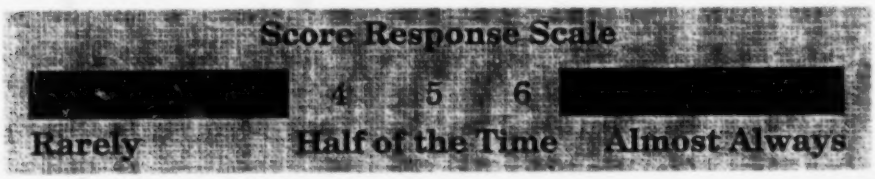
This Tool and the information it contains are the property of Electronic Data Systems Corporation ('EDS') and are made available only to employees of EDS, it subsidiaries,

and affiliates. To the extent permitted by law, EDS retains the right to change, modify, suspend, interpret, or eliminate any provision of this Tool, retroactively or proactively, at any time, with or without notice.

EDS Performance Assessment

Directions:
The importance weight is not pre-assigned. Based on the importance to the individual's job, please assign the importance scale according to the weighting scale provided (1 to 10). Use the Score Response Scale (1 to 9) to determine the frequency (score) that the leader observes the individual demonstrating that stated behavior. The upper end of the scale (7, 8 or 9) indicates that the behavior is almost always characteristic of the individual. The middle of the scale (4, 5 or 6) indicates the behavior is characteristic half the time. The lower end of the scale (1, 2 or 3) indicates the behavior is rarely characteristic of the individual.

The Shared Competencies section accounts for 20% of the overall performance score.



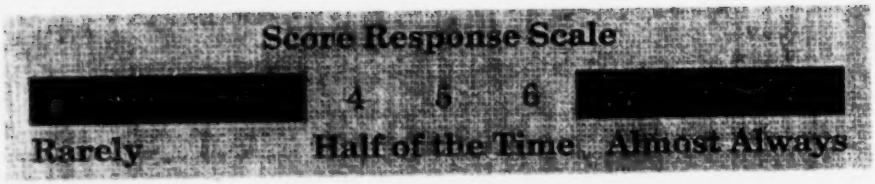
I. Demonstration of Shared Competencies
Importance weights are not pre-assigned. (Based on the importance to the individual's job, assign the importance score accordingly.)

		Importance (Max 10)	Score (1-9)
1.	Communication	10	7
2.	Problem Solving	8	4
3.	Relationship Building	8	4
4.	Teamwork	8	5
5.	Innovation & Change	7	4
6.	Planning & Implementing	9	3
7.	Personal Management	8	3
8.	Market Insight	7	4

EDS Performance Assessment

Directions:
The importance weight is not pre-assigned. Based on the importance to the individual's job, please assign the importance scale according to the weighting scale provided (1 to 10). Use the Score Response Scale (1 to 9) to determine the frequency (score) that the leader observes the individual demonstrating that stated behavior. The upper end of the scale (7, 8 or 9) indicates that the behavior is almost always characteristic of the individual. The middle of the scale (4, 5 or 6) indicates the behavior is characteristic half the time. The lower end of the scale (1, 2 or 3) indicates the behavior is rarely characteristic of the individual. The Job Specific Skills can be found in the attached file. Please locate the job code and transfer the appropriate skills for the employee.

The Job Specific Skills and Supplemental Skills (if any) section accounts for 30% of the overall performance score.



II. Demonstration of Job Specific Skills

Importance weights are not pre-assigned. (Based on the importance to the individual's job, assign the importance score accordingly.)

		Importance (Max 10)	Score (1-9)
1.	Demonstrates Business Acumen appropriate to a(n) Tech Dlvry Team Manager	9	6
2.	Demonstrates Decisiveness appropriate to a(n) Tech Dlvry Team Manager	9	3
3.	Demonstrates People Focus appropriate to a(n) Tech Dlvry Team Manager	7	4
4.	Demonstrates Leadership appropriate to a(n) Tech Dlvry Team Manager	8	4
5.	Demonstrates Execution appropriate to a(n) Tech Dlvry Team Manager	10	4
6.	Demonstrates Client Focus appropriate to a(n) Tech Dlvry Team Manager	8	3
7.	Demonstrates Integrity appropriate to a(n) Tech Dlvry Team Manager	7	3
8.	Demonstrates External Acumen appropriate to a(n) Tech Dlvry Team Manager	7	3

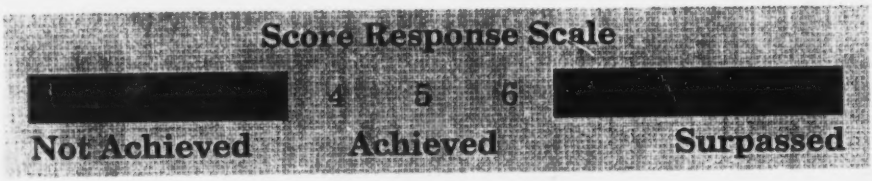
9.	Demonstrates Knowledge Management appropriate to a(n) Tech Dlvry Team Manager	7	4
10.	Demonstrates Strategic Direction appropriate to a(n) Tech Dlvry Team Manager	6	3

EDS Performance Assessment

Directions:

The Objective section requires the leader (with input from the employee as applicable) to document the business and learning objectives for the assessment period. Business objectives should align with the team, account and unit business plans and objectives. For an objective to be included in the overall performance score, an importance weight must be assigned by the leader. Use the Objective Response Scale provided to score the section. Use the upper end of the scale (7, 8 or 9) if the objective has been surpassed (significantly ahead of schedule, under budget, and delights the customer). Use the middle of the scale (4, 5, or 6) if the objective has been achieved (on time, within budget and scope and meets the customer's needs). Use the lower end of the scale (1, 2 or 3) if the objective has not been met (behind schedule, over budget and minimal customer satisfaction). Us [sic] the space following each item to write a brief (1 or 2 sentence) justification of your assessment.

The Objectives section accounts for 50% of the overall performance score.



III. Objectives

Importance weights are not pre-assigned. (Based on the importance to the individual's job, assign the importance score accordingly.)

		Importance (Max 10)	Score (1-9)
1.	Objective: To: Meet Performance & Change Management targets as defined by the Desktop Tower So that: Service Delivery to BellSouth is met or exceeded Achieve By: 12/31/2001 Standards: 1) Severity 1 cases resolved on average of less than 2 hours each month 2) Severity 2 cases resolved on average of less than 3 hours each month 3) Severity 3 cases resolved on average of less than 7.5 business hours each month	10	6

4) Severity 4 cases resolved on average of less than 12 business hours each month

5) Severity 5 cases resolved on average of less than 40 business hours each month

6) Percent commitment on SLA met on all cases to be equal to or better than 85% each month

7) MAC requests completed on average within 5 working days or less

8) All projects complete as quoted for schedule and price

Measurement:
1) Desktop Daily Operational Report

2) Additional reports upon availability

2.	Objective: To: Implement NTI Password aging So that: BellSouth Corporate Security Standard is met Achieve By: 6/30/2001 Standards: 1) Identify process for capturing NTI accounts with variance for no password aging 2) Define tool requirements to automate adding password aging where appropriate and submit tool request	5	5

3) User Acceptance Testing of tool as defined in Standard 3

4) Implementation of process and tool based on above standards

5) Week to Date, Month to Date and Year to Date reporting of account activity where password aging was added

Measurement:
1) Completion of standards 1 & 2 by February 28, 2001

3. Objective: 7 3

To:
Implement TNG Autopaging for Security Breaches

So That:
Bellsouth Corporate Security Standards are met

Achieve By:
6/30/2001

Standards:
1) Identification of security events to be captured in TNG

2) Identification of servers to be monitored for security events outlined in #1

3) Identification of pagers to activate upon security beaches

4) Definition of tool requirements as appropriate and submit tool request

5) User Acceptance Testing of tool as defined in Standard 4

6) Documentation of internal processes to follow upon security breach notification

7) Implementation of TNG autopaging

8) Week to Date, Month to Date and Year to Date reporting of security breach events

Measurement:
1) Completion of standards 1-4 by March 31, 2001

Complete
2) Completion of standard 5-8 by June 30, 2001

4. Objective: 5 5

To:
Delete inactive NTI accounts

So that:
BellSouth Corporate Security Standards are met

Achieve By:
12/31/2001

Standards:
1) Identify source of data to provide list of inactive NTI accounts

2) Identify process for deleting inactive NTI accounts based on data source

3) Define tool requirement for deleting inactive NTI accounts from list & submit tool request

4) User Acceptance Testing of tool as defined in Standard 3

5) Implementation of process and tool based on above standards

6) Development of Month to Date & Year to Date NTI Inactive Account Deletion Reports

Measurement:
1) Completion of standards 1, 2 & 3 by June 30, 2001

2) Completion of standard 4 & 5 by September 30, 2001

3) Process, tool, data, and report validation by November 31, 2001

4) Full implementation by December 31, 2001

5. Objective: 8 5

To:
: Support Desktop Tower Goal of moving 20% of work being completed by Field Support into the DSMC

So that:
That: Increases in customer service delivery and internal efficiency are recognized

Achieve By:
4/30/2001

Standards:
1) Complete migration of backup & restore functions from Field Support by 1/31/012) 2. Migrate remaining Field Support servers to OSS Account Management, Backup/Restore, and Security by March 31, 2001

Measurement:
1a) Implementation of migration project plan

1b) Migration Status Reports

1c) Project Completion Acceptance notification from Billy Butler

2a) Implementation of migration project plan

2b) OSS - Weekly Migration Status Reports detailing "Total Remaining Servers, Total Target Servers, Server Migration Schedule"

6. Objective: 7 3

To:
Implement TNG Autopaging for back-up and restore failures on supported servers

So that:
Failures are readily recognized and addressed

Achieve By:
3/31/2001

Standards:
1) Document and verify all servers to be monitored

2) Identify failure traps to be captured

3) Identify pagers for activation

4) Implementation of TNG Autopaging

Measurement:
1) Completion of standards 1, 2, and 3 by February 15, 2001

2) Completion of standard 4 by March 31, 2001

7. Objective: 8 3

To:
Implement Backup/Restore Failure Reports

So that:
Failures are documented, root cause is determined, and corrective action defined and implemented

Achieve By:
3/31/2001

Standards:
1) Document and verify all servers whose log files are to be scanned

2) Identify process for scanning Backup/Restore log files

3) Define tool requirements for automation of log file scanning & submit tool request

4) User acceptance testing of tool as defined in standard 3

5) Implementation of process and tool based on above standards

6) Generation of Week to Date, Month to Date and Year to Date reports

a. "Backup Report"

i. Number of backups performed on a weekly basis

ii. Number of failures per week

iii. Identification of failed server and root cause of failure

iv. Documentation of corrective action performed

b. "Restore Report"

i. Number of restores performed on a weekly basis

ii. Time required per restore

iii. Number of restore failures per week

iv. If EMC storage (off site), time required to obtain tape/s, load, and perform restore

Measurement:
1) Completion of standards 1-2 by 1/31/01

2) Completion of standard 3 by 2/15/01

3) Completion of standards 4-6 by 3/31/01

8. Objective: 5 4

To:
Develop Security and Backup/Restore Team Time Studies

So that:
Resource requirements can be clearly identified and measured

Achieve By:
2/15/2001

Standards:
1) Identification of tasks performed each day by team

2) Identification of time spent per task each by per team member

3) Generation of summary resource report

4) Extrapolation of summary report to include on-going and pending projects

Measurement:
Completion of standards

9. Objective: 7 4

To:
Average 80 hours training per year per OSS Team Member

So that:
Contract training requirements are met

Achieve By:
12/31/2001

Standards:
1) Technical and Professional training as specified in Individual Development Plans

Measurement:
1) Completion of standards

2) Overall team average of 80 hours training achieved by years end as reported in Train Tracks

10. Objective: 7 5

To:
Meet all project milestones as established and reported by the QSC

So that:
: the pursuit of ISO certification is maintained

Achieve By:
12/1/2001

Standards:
1) Full participation in all scheduled ISO meetings and training

2) Successful completion of any audits

3) Full compliance with set standards

Measurement:
1) Completion of standards

EDS Performance Assessment

IV. Summary

Strengths:

Development Needs:

Performance Summary:
(Provide a narrative summary for the employee)

Your Performance group: Major Development Required

Manager Acknowledgement of Delivery:

_____ Date: _____

Employee Acknowledgement of Delivery:

_____ Date: _____

My signature above acknowledges that my leader and I have discussed the content of this Assessment. My signature is merely acknowledging the receipt of the informatoin and does not indicate my agreement or disagreement with with [sic] ***this assessment or my grouping level.***

In the United States – Please keep a signed copy of this document for three years after the employee has separated from EDS. In the event of a transfer please forward a copy to the gaining manager. For countries outside of the United States, please follow country specific procedures as communicated by your local Human Resources Department.

Supreme Court, U.S.
FILED
NOV 0 4 2003

No. 03-349

IN THE

Supreme Court of the United States

JACK THWEATT, JR.,
on behalf of himself and all others similarly situated,

Petitioner,

v.

ELECTRONIC DATA SYSTEMS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether and, if so, under what circumstances, are disparate impact claims cognizable under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34, despite legislative history which demonstrates that Congress was primarily concerned with *intentional* age discrimination?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, the Respondent, Electronic Data Systems Corporation, states that it has no parent corporation and that no publicly held company owns 10% or more of the Corporation's stock.

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Respondent Electronic Data Systems Corporation ("Respondent" or "EDS") respectfully submits this Brief in Opposition to the Petition for a Writ of Certiorari in this case.

INTRODUCTION

In *Adams v. Florida Power*, 255 F.3d 1322 (11th Cir. 2001), *cert. dismissed*, 535 U.S. 228 (2002), this Court initially granted the petition for a writ of certiorari to hear the question now at issue in this case. For the very reason the Court evidently dismissed the *Adams* petition, as well as for compelling reasons with respect to the nature of the circuit court split and the history of the ADEA itself, Respondent respectfully submits that the petition for a writ of certiorari presently before the Court should be denied.

First, and foremost, after oral argument in *Adams*, the Court dismissed the petition, apparently concluding that *Adams* was not an appropriate vehicle for considering the question whether and, if so, under what circumstances, disparate impact claims may be raised under the ADEA. Specifically, at oral argument, some members of the Court challenged the petitioner to identify the specific employment practice which caused the alleged disparate impact on older workers, rather than merely challenging the *bottom-line or cumulative effects* of the respondent's decision-making process to reduce its workforce.[1] To answer that inquiry in

---

1. Justice Ginsburg, for example, stated

> But as — may I go back to the question we opened with, and that is I don't know of any case under Title VII where someone could just say reduction in force affected more women than men, therefore, I have an impact case. . . . [R]eduction of force in and of itself is not such a neutral rule . . . its too general. So where is the precise rule,

(Cont'd)

this case, Petitioner attempts to challenge Respondent's nationwide performance assessment and ranking process, the "Performance Management Process" or "PMP." Petitioner claims the PMP involved a multi-step process that included the application of subjective and objective criteria by thousands of individual decision-makers in their review of the individual performance of thousands of employees around the company, coupled with a multi-level ranking process that ranked each employee against all the employees that shared that individual's job code throughout the national EDS organization. (Pet. at App. 27-28; Complaint ¶¶35-36). Petitioner claims that this "Process" *as a whole* disparately impacted workers age 40 and older. (Pet. at App. 28; Complaint ¶36).

As evidenced by these very allegations, Petitioner actually has done nothing more than attack the alleged *cumulative or bottom-line effects* of this multi-component process in the same erroneous manner the petitioner in *Adams* sought to challenge the *cumulative or bottom-line* results of the respondent's decision-making process to reduce its workforce. (Pet. at App. 28; Complaint at ¶36). Contrary to this Court's established precedent, Petitioner has wholly failed to isolate and identify which of the numerous components of the PMP allegedly had a significantly disparate impact on employment opportunities for older workers. *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 656-57 (1989). Petitioner's claim that Respondent's *entire* performance and ranking process system had an adverse impact is insufficient as a matter of law. *Id.* Because Petitioner

(Cont'd)

> practice, standard that's comparable to a high school diploma, a height and weight [requirement]. What is there in this case?

Adams v. Florida Power, 2002 WL 483467 *7 (oral argument transcript). App., *infra*, 5a.

has failed to meet this most fundamental requirement of pleading a disparate impact claim, the petition should be denied as this case is not appropriate to resolve when, and under what circumstances, disparate impact claims exist under the ADEA. Moreover, any debate about this critical point would be simply academic as this case arose in the context of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), in which the Eleventh Circuit panel merely held in an unpublished opinion — without performing any analysis of the pleadings — that it was bound by its previous panel's holding in *Adams*. Accordingly, this case lacks a clear and cogent set of facts necessary to facilitate the Court's analysis of the question presented.

Second, while Respondent recognizes that the Court previously decided to hear the question presented in this case, Respondent respectfully submits that the Court should again consider that the purported judicial conflict is not as substantial as Petitioner suggests. Because no reasoned appellate court decision has recognized disparate impact claims under the ADEA since this Court's opinion in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), further consideration of the question by the lower courts would either resolve the conflict among them or sharpen it by provoking a reasoned basis for recognizing such claims.

Third, the decision below to follow *Adams* is correct and therefore does not require review by the Court. Again, with deference to the Court's previous decision to hear the issue in *Adams*, courts, commentators and Justices of this Court have recognized that the text of the statute, its purposes and history demonstrate that disparate impact claims should not be cognizable under the ADEA.

Accordingly, as it has now done at least five times in the recent past, *see, e.g., Adams, supra*; *United Airlines, Inc. v. Frank*, 532 U.S. 914 (2001); *Mullin v. Raytheon Co.*, 528

U.S. 811 (1999); *Ellis v. United Airlines, Inc.*, 517 U.S. 1245 (1996); *EEOC v. Francis W. Parker School*, 515 U.S. 1142 (1995), this Court should deny the petition and thus defer its consideration of the question presented.

STATEMENT OF THE CASE

Respondent, EDS, headquartered in Plano, Texas, is a leader in the global information services industry. EDS specializes in the application of ideas and technology to help private and public sector clients improve their businesses, products, services, and customer relationships. EDS is committed to equal employment opportunity in business operations and employment practices. EDS prohibits discrimination against any applicant or employee on the basis of age or any other protected characteristic.

Petitioner, Jack Thweatt, brought this disparate impact age discrimination claim under the ADEA on behalf of a putative class of EDS employees and former employees. Petitioner claims that he was selected for termination in January 2002 as part of EDS' alleged "rolling" reduction-in-force. (Pet. at App. 21-22, 30; Complaint ¶¶9-10, 13, 15, 43). He alleges that EDS' selection process for conducting its reduction-in-force was based "largely" upon individual employee rankings established through EDS' Performance Management Process ("PMP"), which was implemented in 2000 and revised in 2001. (Pet. at App. 25-27; Complaint ¶¶32-34). Petitioner describes the PMP process in 2000 as containing multiple components, including a performance review conducted by the employee's leader involving subjective and objective criteria; a team ranking of each individual conducted by each team leader; a group meeting of all supervisors to review the rankings of each individual team member and; finally, a ranking of all employees within a specific geographic region by a "Senior Director." (Pet. at App. 25-26; Complaint ¶33).

Petitioner alleges that in 2001, EDS revised the PMP process. While continuing to describe the PMP process as involving multiple components, Petitioner contends that the revised process afforded supervisors the power to subjectively determine the numerical values assigned to each job criterion based on that supervisor's individual impression of the importance of the criterion to the job. (Pet. at App. 25-26; Complaint ¶33). Then, each supervisor was empowered to subjectively score each employee based upon the value the supervisor had subjectively assigned to each criterion. (Pet. at App. 27-28, Complaint ¶35). Additionally, Petitioner asserts that in 2001, rather than ranking each employee within a geographic area, EDS assigned the ranking responsibilities to the "corporate ranks" who ranked each individual against all the employees that shared that individual's job code throughout the national EDS organization, fitting the local scores into ranking percentages that had been predetermined. (Pet. at App. 27-28; Complaint ¶35). Finally, Petitioner claims that "[o]rganizationally," there were "numerous delays" in the dissemination of information to supervisors, as well as "considerable confusion" in establishing performance objectives. (*Id.*) In summary, Petitioner claims that "[t]he Process" *as a whole* impacted workers age 40 and older within EDS adversely because they "tended to receive lower rankings in the PMP" and, consequently, were terminated in the reduction-in-force. Petitioner claims "that almost 70% of employees terminated in the reduction-in-force were age 40 and older." (Pet. at App. 28; Complaint ¶36).

Before the District Court, EDS moved to dismiss the Complaint for failure to state a claim upon which relief could be granted under Fed. R. Civ. P. 12(b)(6), arguing that the District Court was bound by the Eleventh Circuit's decision in *Adams*. The District Court agreed and granted EDS' Motion to Dismiss. On appeal, the Eleventh Circuit affirmed the District Court's order, concluding that it too was bound by the holding of the *Adams* panel.

REASONS FOR DENYING THE PETITION

I. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR RESOLVING WHETHER AND, IF SO, UNDER WHAT CIRCUMSTANCES, DISPARATE IMPACT CLAIMS MAY BE BROUGHT UNDER THE ADEA

Petitioner asks this Court to decide whether and, if so, under what circumstances, a disparate impact claim may be brought under the ADEA. Respondent submits that Petitioner's case is not the appropriate vehicle for deciding this question. Though Petitioner asks the Court to recognize disparate impact claims under the ADEA, he even failed to properly plead a disparate impact claim in his Complaint. Furthermore, because the affirmance of Respondent's Motion to Dismiss was based upon the Eleventh Circuit's conclusion that it was bound by its previous panel's ruling in *Adams* — without any analysis of the pleadings — the Court would be forced to decide this issue in an abstract and unhelpful context without the benefit of any factual development. This Court should decide such a question, if it needs to decide the question at all, only in a case where there can be no debate that the claim is well-pleaded and supported by a factual record that facilitates legal analysis.

First, the question whether a disparate impact claim is cognizable under the ADEA is entirely academic here because the Complaint failed to state a valid disparate impact claim under this Court's established disparate impact jurisprudence. Because disparate impact claims "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another," *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (quotation omitted), a party asserting a disparate impact claim "*must* begin by identifying the specific

employment practice that is challenged. . . . [T]he plaintiff is in our view responsible for *isolating and identifying the specific employment practices* that are allegedly responsible for any observed statistical disparities." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988) (O'Connor, J.) (plurality op.) (emphasis added); *accord*, *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 656-57 (1989). In other words, as the Court implicitly recognized in *Adams*, the disparate impact model is not an appropriate vehicle from which to launch a wide-ranging attack on the *cumulative or bottom-line effects* of employment practices. *Wards Cove*, 490 U.S. at 656-57. *See also Munoz v. Orr*, 200 F.3d 291, 297 (5th Cir. 2000); *Anderson v. Douglas & Lomason Co.*, 26 F.3d 1277 (5th Cir. 1994); and *Appleton v. Deloitte & Touche L.L.P.*, 168 F.R.D. 221 (M.D. Tenn. 1996).

In *Wards Cove*, a class of nonwhite cannery workers who were or had been employed at the canneries in question brought a disparate impact claim against the canneries alleging that the challenged racial stratification of the workforce was caused by *several* aspects of the canneries' selection process, including the use of subjective decision-making and the use of objective practices such as a rehire preference, separate hiring channels and nepotism. *Wards Cove*, 490 U.S. at 656-57. The Court of Appeals held that the plaintiffs had properly asserted a disparate impact claim. *Id.* On certiorari, the employers claimed that the Court of Appeals erred by allowing the plaintiffs to proceed with their disparate impact claim based solely on "[one] set of cumulative comparative statistics as evidence of the disparate impact of *each and all* of [petitioners' hiring] practices." *Id.* at 656 (emphasis added). In reversing the Court of Appeal's decision, this Court agreed, emphasizing that a plaintiff "does not make out a case of disparate impact simply by showing that, 'at the bottom line,' there is racial *imbalance*

in the work force." *Id.*, *citing Connecticut v. Teal*, 457 U.S. 440, 450 (1992) (emphasis in original). The Court emphasized that:

> Respondents will . . . have to demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking here, *specifically showing that* ***each*** *challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites.* To hold otherwise would result in employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances. . . .'

Id. at 657, *citing Watson*, 487 U.S. at 992 (emphasis added). In other words, the Court in *Wards Cove* held that plaintiffs alleging disparate impact discrimination must isolate and identify a *particular* employment practice that has a disparate impact on the protected group. Simply claiming that an employer's *entire* selection process *as a whole* has a disparate impact is insufficient. *Id.* After the Court's decision in *Wards Cove*, courts have continued to emphasize that a plaintiff cannot successfully assert a disparate impact claim merely by claiming that the cumulative or bottom-line impact of the employer's selection process results in an adverse impact on members of a protected class. Rather, a plaintiff must still identify a *particular* part of the selection process that causes the challenged adverse impact. *See* the following and cases cited therein: BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW vol. 1, 100-02 (Paul W. Cane, Jr. ed., 3d ed. 1996); BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW vol. 2, 1701-02 (Paul W. Cane, Jr. ed., 3d ed. 1996); BARBARA LINDEMANN

& PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 78-80, 1167-68 (C. Geoffrey Weirich ed., 3d ed. Supp. 2002).[2]

2. In the Civil Rights Act of 1991, Congress codified in part and departed in part from the Court's decision in *Wards Cove*. Under the 1991 Act, a plaintiff can sufficiently plead a disparate impact claim based solely upon a bottom-line disparity resulting from the challenged selection process where the plaintiff "demonstrate[s] to the court that the elements of a respondent's decision-making process are not capable of separation for analysis." 42 U.S.C. § 2000e-2(k)(1)(A)(i), (B)(i). Thus, if the challenged decision-making process includes multiple, but functionally integrated practices, the plaintiff bears the burden of demonstrating that the elements of the employer's decision-making process are not capable of separation for analysis and must be analyzed as one employment practice. *Id. Malave v. Potter*, 320 F.3d 321 (2d Cir. 2003), *citing Stout v. Potter*, 276 F.3d 1118, 1124 (9th Cir. 2002). *See also Smith v. Xerox*, 196 F.3d 358 (2d Cir. 1999); *Gonzales v. City of New Braunfels*, 176 F.3d 834 (5th Cir. 1999); KINGSLEY R. BROWNE, THE CIVIL RIGHTS ACT OF 1991: A "QUOTA BILL," A CODIFICATION OF GRIGGS, A PARTIAL RETURN TO WARDS COVE, OR ALL OF THE ABOVE?, 43 CASE W. RES. 287, 329-30 (1993)

> . . . the elements must not be *capable* of separation for analysis. The plaintiff has the burden of proving that he is entitled to rely on that exception and cannot satisfy that burden merely by showing that he has been unable to identify those elements or that it would be very difficult or expensive to do so.

Because the ADEA was not amended in the wake of *Wards Cove*, *supra*, the 1991 Act is irrelevant to Petitioner's claims and his reliance on the "bottom line" would render the Complaint subject to dismissal even if a disparate impact theory were available under the ADEA. In any event, courts have determined that the 1991 Act did not alter the "particularity" aspect of *Wards Cove*. *See, e.g., Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1372 (5th Cir. 1992); *Stout*, 276 F.3d at 1124 (court "doubt[ed] that the overall screening process should be treated as one employment practice for purposes of disparate impact analysis."); *Munoz*, 200 F.3d at 304 (questioning, without deciding, whether the plaintiffs had properly alleged that the employer's "Merit Promotion Plan" or "MPP" was either one employment practice or could be separated for analysis).

This is certainly not a case where the petitioner challenges a discrete, straightforward, neutral rule such as a high school diploma, a height requirement or a weight requirement. To the contrary, in the present case, Petitioner attempts to challenge the alleged cumulative effects of Respondent's complex, multi-layered performance evaluation and ranking process in direct contravention of this Court's holding in *Wards Cove*. *Wards Cove*, 490 U.S. at 656-57. Petitioner has failed to isolate and identify which of the numerous practices that comprise the PMP he claims is responsible for the alleged disparate impact. For example:

1) Is it the actual performance assessment process in which each employee was subjectively reviewed on a local basis by their respective different supervisors? (Pet. at App. 27; Complaint ¶35(A)).

2) Is it the practice by which the numerical values assigned to criteria leading to the score of each employee were subjectively assigned by different supervisors based on that supervisor's impression of the importance of the criteria to the job? (Pet. at App. 27; Complaint ¶35(A)).

3) Is it the actual ranking process that was performed by the "corporate ranks" once the local managers reviewed and scored the individuals on their teams? (Pet. at App. 28; Complaint ¶35(C)).

4) Is it the practice by which the rankings were performed across job codes nationally and not within a specific geographic region? (Pet. at App. 29; Complaint ¶37(B)).

5) Is it the practice by which the PMP required employees to be placed into categories to meet predetermined statistical needs of the ranking model, not Respondent's needs? (Pet. at App. 29; Complaint ¶37(A)). ***or***,

6) Is it that "[o]rganizationally" there were delays in the dissemination of information and there was "considerable confusion" in the establishment of performance objectives? (Pet. at App. 28; Complaint ¶35(D)).

While Petitioner has attempted to dress up his Complaint to meet the misgivings expressed by the Court during oral argument in *Adams*, in the end, Petitioner has done nothing more than attack the *cumulative or bottom-line* results of Respondent's overall performance evaluation and ranking processes. *See Wards Cove*, 490 U.S. at 656-57. Although this Court has recently held that a plaintiff alleging employment discrimination need only provide a "short and plain statement of the claim showing that the pleader is entitled to relief," that decision does not relieve the plaintiff of the obligation to identify in his pleadings a specific employment practice that is the cause of the disparate impact. *Swierkiewicz v. Sorema*, 534 U.S. 506, 512 (2002).

Where, as here, members of the protected class were evaluated and ranked at different times, by different decision-makers, based on different considerations or criteria, as part of a multi-layered selection process, Petitioner's allegation that the "Process" as a whole caused a disparate impact on older workers is legally insufficient. (*See, e.g.*, Pet. at App. 28-29, 30-31; Complaint ¶¶36, 37, 41, 43 and 44). *See also Smith*, 196 F.3d at 367; *Anderson*, 26 F.3d at 1284. To recognize a disparate impact claim in this setting would result in Respondent being potentially liable for "the myriad of innocent causes" that may have led to the alleged disparity in the group of employees selected for its reduction in force. *Wards Cove*, 490 U.S. at 657.

Second, this case does not present the question whether and, if so, under what circumstances, disparate impact claims

may be brought under the ADEA in a helpful context for a decision by the Court. Because Petitioner's disparate impact allegations are conclusory, and because none of the averments supporting the disparate impact claim were even analyzed by the court below, the record underlying these allegations is undeveloped and would require a pronouncement in the abstract that would border on the advisory. Any effort to resolve such a question in this petition would be seriously hampered by both the lack of a concrete, well-pleaded disparate impact claim and the lack of a clear and cogent set of facts serving as a base for the Court's legal analysis. It bears repeating that the Eleventh Circuit did not review the pleadings or substantively discuss the question of whether the ADEA recognizes disparate impact claims. Rather, the Eleventh Circuit, in its unpublished holding, merely concluded that it was bound by the *Adams* panel's prior ruling on the issue. As a consequence, it would be more prudent to address the question presented in the context of a record that is adequately developed and that sharpens the issue. Certainly, without such a record, the Court simply cannot sensibly determine, as Petitioner requests, the circumstances, if any, in which a disparate impact claim would be appropriate under the ADEA. *See, e.g., Secretary of State of Maryland v. Munson*, 467 U.S. 947, 977 (1984) (Rehnquist, J. dissenting) (noting that decisions based upon well developed factual records are likely to be "more sound" because "the facts of the case focus and give meaning to the otherwise abstract and amorphous issues the court must decide").

In summary, this case is an inappropriate vehicle for considering whether, and, if so, under what circumstances, disparate impact claims are cognizable under the ADEA. The question before the Court arises in a Complaint without sufficient allegations to present the question and without a developed factual record concerning the claims in this case.

Respondent respectfully contends that the debate regarding these tangential, but significant issues, would overshadow and undermine the Court's resolution of the central issue on which Petitioner seeks a writ of certiorari.

II. THE PURPORTED SPLIT AMONG THE COURTS OF APPEAL IS NEITHER AS PROFOUND NOR AS SEVERE AS PETITIONER SUGGESTS

Respondent respectfully submits that the issue presented to the Court by Petitioner is ripe for further debate and perhaps resolution by the Courts of Appeal, rather than by this Court. Although Petitioner suggests that "[i]t is hard to conceive of a case presenting a clearer conflict in the circuits," Pet. at 12, the circuit split is neither as profound nor as severe as Petitioner represents. The decision below is supported by every reasoned appellate court decision on the subject; and since this Court's 1993 decision in *Hazen Paper*, a number of Courts of Appeal have reversed their prior positions and held that disparate impact claims are not cognizable under the ADEA. Therefore, Respondent submits that the current judicial conflict over whether the ADEA recognizes disparate impact claims will resolve itself through further consideration by the lower courts. Even if that resolution does not occur, further analysis by the lower courts will assist the Court in sharpening the issue for this Court's ultimate consideration.

Since this Court's decision in *Hazen Paper*, "there is a clear trend toward concluding that the ADEA does not support a disparate impact claim." *Ellis*, 73 F.3d at 1009. Prior to *Hazen Paper*, some lower courts had carried over disparate impact law from Title VII to the ADEA, but they did so with little analysis. *See, e.g., Geller v. Markam*, 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981). After *Hazen Paper* cast doubt upon those decisions, a number of

courts of appeals revisited the issue and determined that disparate impact claims are not recognized under the ADEA.

For example, both the Seventh and Tenth Circuits reversed prior decisions and held that disparate impact claims are not cognizable under the ADEA. *See EEOC v. Francis W. Parker School*, 41 F.3d 1073, 1076-78 (7th Cir. 1994), *cert. denied*, 515 U.S. 1142 (1995); *Ellis*, 73 F.3d at 1006-10. The First Circuit concurred, and opinions from other circuits have expressed support for this position. *Mullin*, 164 F.3d at 699-704; *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 1004 (5th Cir. 1996) (en banc) ("*Hazen Paper* indicates that disparate impact theory is not available under the ADEA."); *Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union*, 53 F.3d 135, 139 n.5 (6th Cir. 1995) (expressing "considerable doubt as to whether a claim of age discrimination may exist under a disparate theory" in an ADEA case); *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732-34 (3d Cir. 1995) (same). Of course, most recently, the Eleventh Circuit, after close analysis of the text of the statute, its purposes and legislative history, as well as practical considerations, held that the ADEA does not recognize disparate impact claims. *Adams*, *supra*.

After *Hazen Paper*, three circuits — the Second, the Eighth and the Ninth — have continued to recognize disparate impact claims under the ADEA. Notably, however, none of these circuits has actually analyzed anew whether such claims are properly recognized. Instead, noting that *Hazen Paper* did not formally resolve the issue, these courts have chosen to follow their pre-*Hazen Paper* precedent without any discussion of the substance of that precedent. *See, e.g.*, *District Council 37, AFSCME v. New York City Dep't of Parks and Recreation*, 113 F.3d 347, 351 (2d Cir. 1997); *Houghton v. SIPCO, Inc.*, 38 F.3d 953, 958-59 (8th Cir. 1994); *EEOC v.*

Local 350 Plumbers and Pipefitters, 998 F.2d 641, 648 n.2 (9th Cir. 1993). Moreover, because the cases recognizing disparate impact claims in the Second and Eighth Circuits were decided against the plaintiffs, the recognition of disparate impact in those circuits was actually dicta; only the Ninth Circuit has affirmed a disparate impact claim on appeal since *Hazen Paper*. *See Frank v. United Airlines*, 216 F.3d 845, 856 (9th Cir. 2000), *cert. denied*, 532 U.S. 914 (2001); *Arnett v. California Pub. Employees Retirement Sys.*, 179 F.3d 690, 696-97 (9th Cir. 1999), *vacated and remanded*, 528 U.S. 111 (2000). The Court should also note that opinions from each of these circuits have expressed discomfort in continuing to recognize disparate impact under the ADEA. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1291 n.6, 1292 n.7 (9th Cir. 2000) (noting that the circuit has "continued to *assume* that this [disparate impact] theory is still viable after *Hazen Paper*") (emphasis added), *cert. denied*, 533 U.S. 950 (2001); *Smith*, 196 F.3d at 366 n.5 (noting that the circuit has analyzed disparate impact claims under the ADEA "without discussion"); *Smith v. City of Des Moines, Iowa*, 99 F.3d 1466, 1470 (8th Cir. 1997) (noting that the panel was bound by prior precedent "even if we believed that *Hazen Paper* cast doubt on the validity" of that precedent). Consequently, if these courts reconsider whether disparate impact claims are cognizable under the ADEA, they may, like the Seventh and Tenth Circuits before them, reverse their prior positions and find that such claims are not cognizable under the ADEA.

Respondent respectfully submits that further lower court consideration of the status of disparate impact claims under the ADEA may better illuminate the question whether the ADEA properly recognizes such claims. The opinions concluding that the ADEA recognizes disparate impact claims have so far failed to offer any justification for doing so beyond

the similarities in some of the language of Title VII and the ADEA. The thorough reasoning of the opinions rejecting such claims may cause any future opinions adopting the contrary position to conduct a more searching analysis, which in turn may sharpen the issue and facilitate the Court's resolution of it.

III. THE DECISION BELOW CORRECTLY FOLLOWED THE *ADAMS* HOLDING AND DOES NOT REQUIRE REVIEW BY THIS COURT

The court below did nothing more than abide by the Eleventh Circuit's previous decision in *Adams*. It performed no independent analysis of the viability of disparate impact claims under the ADEA, nor did it even have the need to review the pleadings to assess whether a disparate impact claim had actually been pled. However, to the extent that the court below agreed with the *Adams* panel that the ADEA does not recognize disparate impact claims, it is noteworthy that there was no error committed by the court and thus there is no reason to review that court's decision. As various courts, commentators and Justices of this Court have recognized, the ADEA does not authorize disparate impact claims. In addition to the failure to sufficiently plead a disparate impact claim and the lack of a developed record that make this case a poor vehicle for considering this issue, the arguments in favor of recognizing disparate impact claims under the ADEA set forth in the petition are wholly unpersuasive.

A. The Background of the ADEA Demonstrates That the Disparate Impact Theory is Not Viable Under the ADEA

The ADEA was enacted based on Congressional concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes. *Adams*, 255 F.3d at 1325-26; *see also Hazen Paper*, 507 U.S. at 610, 113 S. Ct. at 1706. Thus, the ADEA was enacted to prohibit decision-making based on arbitrary, inaccurate perceptions of the abilities of older workers. It is evident that when an employer relies on factors other than age in making employment decisions, such arbitrary and inaccurate stereotyping disappears.[3]

1. *Congress Recognized that Age Differs from the Traits Protected Under Title VII.*

During the congressional debates on the Civil Rights Act of 1964, an amendment was proposed to add "age" to Title VII's laundry list of protected traits, thereby protecting age on a basis identical to race, color, sex, religion, and national origin. However, that amendment was rejected. 100 Cong. Rec. 2596-99, 9911-9913, 13490-13492 (1964); EEOC, Legislative History of the Age Discrimination in Employment

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3. By contrast, Title VII was enacted in an

> effort to equalize employment opportunities for individuals whose employment prospects had been dimmed by past discriminatory practices . . . [so] neutral, non-essential employment policies that discriminatorily impact[ed] protected groups would . . . exacerbate the preexisting imbalance and countervail the core purposes of Title VII. Hence, the [Supreme] Court [in *Griggs*] had ample reason to construe the language of Title VII to bar such practices.

Mullin, 164 F.3d at 701.

Act 5-14 (1981). Thus, Congress, at the outset of its regulation of workplace discrimination, recognized that age differed from race, color, sex, religion, and national origin.

Title VII did include a provision directing the Secretary of Labor to "make a full and complete study of the factors which tend to result in discrimination because of age" and report to Congress. Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 265 (1964). Congress further instructed the Secretary to report "such recommendations for legislation to prevent arbitrary discrimination in employment because of age." *Id.*

2. *The Secretary of Labor's Report Was Only Concerned With Intentional Discrimination.*

The ADEA was enacted upon recommendations from the Secretary of Labor in the report, "The Older American Worker: Age Discrimination in Employment" (1965) ("Secretary of Labor's Report") (as discussed in *Ellis*, 73 F.3d at 1008; *Mullin*, 164 F.3d at 703; *Adams*, 255 F.3d at 1325-26) (App. B, *infra*, 8a-15a). Petitioner ignores the importance of this Report. However, the Secretary of Labor's Report is the blueprint for the ADEA, and its importance cannot be disregarded. The Secretary of Labor's Report is in essence the legislative history of the ADEA.

The Secretary of Labor testified that the proposed bill which became the ADEA was directed at arbitrary discrimination which is made in the absence of any legitimate relevance between age and employment capacity. *See* Hearings on S. 830 Before the Subcomm. on Labor of the Senate Subcomm. on Labor and Public Welfare, 90th Cong. 37 (1967). Arbitrary means "depending on choice or discretion," clearly signifying intentional conduct. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, pg. 110 (1976).

The Secretary of Labor's Report distinguished between problems of intentional, arbitrary discrimination based on age stereotypes and problems resulting from factors that affect older workers more strongly as a group. App. B, Secretary of Labor's Report at 8a-11a. The predominant form of discrimination facing older workers was arbitrary discrimination. *Id.* Still, the Secretary recognized that, "[t]o eliminate discrimination in the employment of older workers, it will be necessary not only to deal with overt acts of discrimination, but also to adjust those present employment practices which quite unintentionally lead to age limits in hiring." *Id.* at 15a.

Despite acknowledging the existence of practices the effects of which disproportionately disadvantage older workers, the Secretary *did not* recommend that the proposed legislation prohibit such practices. Rather, the Secretary suggested that "special arrangements" be made through education, research, and the institution of programmatic measures designed to improve opportunities for older workers. *Id.* at 11a-15a. The Report noted the need for legislation to prohibit intentional discrimination and ban arbitrary discrimination based on age and stereotypical perceptions of the elderly. App. B, Secretary of Labor's Report at 8a-15a; *Mullin*, 164 F.3d at 703; *Adams*, 255 F.3d at 1325-26. But the Secretary found that barring neutral practices that may have an adverse impact on older workers is "futile as public policy, and even contrary to the public interest." App. B, Secretary of Labor's Report at 11a.

In 1967, based on the Secretary of Labor's Report, Congress enacted the ADEA, P.L. 90-202, "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; and to help employers and workers find ways

of meeting problems arising from the impact of age on employment." ADEA § 2, 29 U.S.C. § 621(b). The ADEA included prohibitions of age discrimination to address intentional discrimination (ADEA § 4, 29 U.S.C. § 623) and required the Secretary of Labor to conduct education and research programs to help meet the problems arising from the impact of age on employment. ADEA § 3, 29 U.S.C. § 622. Thus, the Secretary of Labor's 1965 Report on age discrimination provides powerful support for the Eleventh Circuit's conclusion that the ADEA does not recognize disparate impact claims.

B. The ADEA Does Not Expressly Authorize Claims Based on Disparate Impact

Petitioner errs in contending that the "plain language" of the ADEA supports disparate impact claims because § 4(a)(2) of the Act "imposes liability for employment practices that 'adversely' affect an employee's 'status.'" Pet. at 14-16; 29 U.S.C. § 623(a)(2). Section 4(a)(2) of the ADEA makes it unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623(a). Nowhere in this language are disparate impact claims contemplated or acknowledged. As several authorities have recognized, including those cited by Petitioner, a textual analysis that recognizes disparate impact is a "grammatically incorrect reading." *DiBiase*, 48 F.3d at 733 (opinion of Greenberg, J.); *see also* Pamela S. Krop, Age Discrimination and the Disparate Impact Doctrine, 34 Stan. L. Rev. 837, 842-43, & n.27 (1982)).

The Court in *Hazen Paper* stressed that the prohibitions of disparate treatment due to age are embodied in the phrase

"because of such individual's age." *Hazen Paper*, 507 U.S. at 609, *quoting* 29 U.S.C. § 623(a)(1) (disparate treatment theory is triggered when an employer "fail[s] or refuse[s] to hire or . . . discharge[s] any individual or otherwise discriminate[s] against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's age*.") (Emphasis in original). That is also the operative language of § 4(a)(2). "It would be a stretch to read the phrase 'because of such individual's age' to prohibit incidental and unintentional discrimination." *Ellis*, 73 F.3d at 1007. As both §§ 4(a)(1) and (2) end with the phrase "because of such individual's age," if § 4(a)(1) proscribes only disparate treatment based on this language, then § 4(a)(2) must be similarly limited.

The *Ellis* court stated that since § 4(a)(2) expressly concludes with the same phrase, a parallel reading of the two statutes would require the court to conclude that both are limited to intentional discrimination. *Ellis*, 73 F.3d at 1007. Numerous appellate courts have concurred with the reasoning in *Ellis*. Since this Court identified and emphasized the "because of such individual's age" language is indicative of disparate treatment, that logic should apply to § 4(a)(2) as well. The exclusion of the word "discriminate" and the inclusion of the words "adversely affect" does not compel a different conclusion:

> [T]he 'because of such individuals age' clause can only modify the description of prohibited actions. . . . The parallel working of section [623](a)(2) indicates that it too was aimed at disparate treatment. An employer may not limit, segregate, or classify employees on the basis of age in a manner that would adversely affect an employee.

DiBiase, 48 F.3d at 733-34 (*quoting* Krop, 34 STAN. L. REV. at 843).

Moreover, reading "because of such individual's age" to modify "adversely affect" rather than to modify "limit, segregate, or classify" is grammatically incorrect because of the placement of commas. *DiBiase*, 48 F.3d at 733 (*citing* Krop, 34 Stan. L. Rev. at 842-43). The comma between the "adversely affect" and the "because of" language in Section 4(a)(2), makes any junction between the two grammatically incorrect. *Cf. United States v. Ron Pair Enterp.*, 489 U.S. 235, 241 (1989) (holding that commas prevent junction of language in 11 U.S.C. § 506(b)). The phrase "deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age," is not naturally read as establishing a standard of liability, but most naturally must be understood to indicate that unlawful intent is necessary to establish liability for employment practices that adversely affect older employees. *DiBiase*, 48 F.3d at 733.

C. The Reasonable Factors Other Than Age Provision Precludes Disparate Impact Claims

Petitioner similarly errs in contending that the "reasonable factors other than age" provision in § 4(f)(1) must be construed as an affirmative defense against disparate impact claims. *See* 29 U.S.C. § 623(f)(1). Courts that have analyzed the reasonable factors other than age provision in § 4(f) have almost universally held that the reasonable factors other than age provision *precludes* disparate impact claims. *See Adams*, 255 F.3d at 1325; *Ellis*, 73 F.3d at 1007-08; *Francis W. Parker School*, 41 F.3d at 1077; *DiBiase*, 48 F.3d at 734; *Mullin*, 164 F.3d at 702. Notably, this provision is absent from Title VII.

Section 4(f)(1), which allows the use of reasonable factors other than age in making employment decisions, is inconsistent with a disparate impact theory of liability,

because "it suggests that decisions which are made for reasons independent of age but which happen to correlate with age are lawful." *Francis W. Parker School*, 41 F.3d at 1077. A consistent reading of this language demonstrates that the exception is meaningless unless the prohibitions of the ADEA forbid disparate treatment and the exception in § 4(f)(1) permits neutral practices that have the effect of differentiating due to age. *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1220 (7th Cir. 1987) (Easterbrook, J. dissenting). *See also*, *DiBiase*, 48 F.3d at 734 ("[B]y the statutory language itself, Congress recognized that neutral policies not motivated by discriminatory intent may be permissible employment practices. . . . [A]pplication of disparate impact theory could lead to results which Congress probably did not intend.")

Section 4(f)(1) is inconsistent with disparate impact claims because it permits employers to utilize factors other than age as grounds for employment-based decisions that differentially impact older employees. *Adams*, 255 F.3d at 1325. If the "reasonable factor other than age" provision does not preclude disparate impact liability, it would be meaningless:

> If the exception contained in section 623(f)(1) is not understood to preclude disparate impact liability, it becomes nothing more than a bromide to the effect that 'only age discrimination is age discrimination.' Such a circular construction would fly in the teeth of the well-settled canon [of statutory construction] that 'all words and provisions of a statute are intended to have meaning and are to be given effect, and no constructions should be adopted which would

render statutory words or phrases meaningless, redundant, or superfluous.'

Mullin, 164 F.3d at 702. Because "application of [the] disparate impact theory could lead to results which Congress probably did not intend," *DiBiase*, 48 F.3d at 734, Section 4(f) of the ADEA, a provision absent from Title VII, precludes disparate impact claims.

In the Secretary of Labor's Report, the Secretary recognized the necessity of acknowledging forces of circumstance that "unquestionably affect older workers more strongly, as a group." App. B, Secretary of Labor's Report at 11a. The Secretary identified a number of factors, such as health, educational attainment and technological change. Thus, the Secretary of Labor's Report recognized that when health is a factor for obtaining a job, older workers may, quite justifiably, be rejected in greater proportion than younger workers. However, older workers should not be excluded from consideration based on their age rather than their health. Section 4(f) adopts this very distinction. Consistent with the Secretary of Labor's findings, older workers should not be denied employment based on assumptions concerning their health. Rather, if good health is a factor considered for employment, the employer may use that factor regardless of its greater impact on older workers.

In his report, the Secretary of Labor drew a sharp distinction between "arbitrariness of specific age limitations, indiscriminately applied" and "the force of certain circumstances which unquestionably affect older workers more strongly, as a group, than they do younger workers." App. B, Secretary of Labor's Report at 11a. Ultimately, the Secretary of Labor recommended statutory prohibitions against arbitrary discrimination based on age, but to address

other impediments to employment of older workers, he recommended adjustment of "institutional arrangements," an increase in "the availability of work for older workers," and enlargement of "educational concepts in institutions" to meet the needs and opportunities of older age. *Id.* at 12a-13a. Plainly, when Congress enacted the ADEA, it heeded the Secretary of Labor's recommendation and prohibited only intentional discrimination based on age, while recognizing that other reasonable factors such as health, education and technology change may, unavoidably, lead to lawful differences in the employment of younger and older workers. Section 4(f) embodies this recognition.

D. The Supreme Court Relied on the Intent of Title VII, Rather Than a Specific Section of Title VII, in Creating the Disparate Impact Theory in *Griggs*

Petitioner also erroneously suggests that this Court's decision in *Griggs et al. v. Duke Power Co.*, 401 U.S. 424 (1971), was premised on an analysis of the specific language in Title VII, rather than on this Court's analysis of Title VII's intent. Though lower courts later stated that § 703(a)(2) of Title VII, 42 U.S.C. § 2000e-2(a)(2), was the basis for the holding in *Griggs*, *see, e.g.*, *Francis W. Parker School*, 41 F.3d at 1077, a careful reading of *Griggs* demonstrates that this Court based its opinion on its perception that Title VII was intended to address the long history of societal and historical bias against blacks.

Griggs involved a claim by a black plaintiff against an employer with a history of blatantly exclusionary practices. *Griggs*, 401 U.S. at 426-27. Following the passage of the Civil Rights Act in 1964, the employer replaced those practices with two facially neutral job requirements: a high school diploma and a satisfactory score on a standardized

aptitude test. *Id.* at 427-28. Despite facial neutrality and neutrality in application, the two requirements disqualified a disproportionate percentage of black applicants from consideration for desirable positions; almost three times as many whites as blacks could meet the high school diploma requirement, and almost ten times as many whites as blacks passed the standardized aptitude test requirement. *Id.* at 430 n.6. The lower courts concluded that there was no showing of a racial purpose or invidious intent in the adoption of the two requirements, and held the employer's use of the requirements was lawful under Title VII. *Id.* at 428-29. This Court reversed. However, while the *Griggs* opinion judicially created the theory of disparate impact, it did so based on an analysis of the intent, as opposed to the text, of the statute.

In *Griggs*, the court focused on the historical background of racial discrimination. As justification for the disparate impact theory, the Court relied upon the general purpose and principles of Title VII. *Id.* at 429-32. The only reference to a specific section of Title VII was in footnote one, where the Court quoted §§ 703(a)(2) and (h). Without any textual reference, the Court found that "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." *Griggs*, 401 U.S. at 432. Thus, the Court believed the intent of Title VII was focused on the consequences of employer actions, regardless of intent:

> The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be

> maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.

Griggs, 401 U.S. at 429-30; *Connecticut v. Teal*, 457 U.S. at 448. *See also Ellis*, 73 F.3d at 1003 n.13 ("*Griggs* did not base its holding on the text of Title VII, but rather looked primarily to the larger objectives underlying Congress' enactment of Title VII")[4]; *DiBiase*, 48 F.3d at 734 (same). The Court was obviously influenced by the employer's history of overt racial discrimination, which ceased after the enactment of Title VII, but was replaced by the diploma and testing requirements at issue. *Griggs*, 401 U.S. at 428-29. It is the overt prejudice noted in *Griggs* that separates racial discrimination from age discrimination. A remotely similar history of invidious age discrimination does not exist. In fact, the Secretary of Labor's Report stated that it would be "wrong" to apply the prohibitions of Title VII to discrimination based on age because Title VII discrimination "often has its origins in prejudices that originate outside the sphere of employment. *There are no such prejudices in American life which apply to older persons.*" App. B, Secretary of Labor's Report at 9a-10a (emphasis added).

As the Third Circuit Court found in *DiBiase*, *supra*, the policy of Title VII is not easily transplanted into the ADEA because the purpose of the ADEA was to prohibit employers from acting upon an assumption that "productivity and competence decline with old age." *DiBiase*, 48 F.3d at 734. Thus, as disparate impact theory is premised upon the deplorable history of racial discrimination and the larger objectives underlying Title VII, *Ellis*, 73 F.3d at 1007 n.13, it does not apply to age-based conduct. Therefore, the analysis employed in *Griggs* does not transfer to the ADEA context.

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4. *Ellis* continued, "the ADEA differs from Title VII in these nontextual considerations, as well as its text and structure." *Ellis*, 73 F.3d at 1007 n.13.

CONCLUSION

Despite Petitioner's attempt to plead around the concerns raised by the Court at oral argument in *Adams*, Petitioner, like the petitioner in *Adams*, merely challenges the cumulative effect of Respondent's nationwide performance and ranking decision-making process. Such a broad attack is improper to support a disparate impact claim. Further, as the court below merely abided by the *Adams* panel's holding, it had no reason to thoroughly examine the deficiencies in Petitioner's Complaint. Accordingly, this case is simply not a conducive vehicle for the Court to answer the question presented. For this dispositive reason, and the additional compelling considerations addressed above, Respondent respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — EXCERPTS FROM ORAL ARGUMENT OF *ADAMS v. FLORIDA POWER*, 2002 WL 483467 DATED MARCH 20, 2002

SUPREME COURT OF THE UNITED STATES

No. 01-584

Wednesday, March 20, 2002

Oral Argument

Wanda ADAMS, et al.,

Petitioners,

v.

FLORIDA POWER CORPORATION
and FLORIDA PROGRESS CORPORATION,

Respondents.

Washington, D.C.

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

JOHN J. CRABTREE, ESQ., Key Biscayne, Florida; on behalf of the Petitioners.

GLEN D. NAGER, ESQ., Washington, D.C.; on behalf of the Respondents.

Appendix A

* * *

ORAL ARGUMENT OF JOHN G. CRABTREE
ON BEHALF OF THE PETITIONERS

* * *

QUESTION: May I ask, because it's always helpful to me to know, what's at stake in the particular case. What is the practice that you claim has a disparate impact in this case?

MR. CRABTREE: We have alleged in this case that the employer's reduction in force has had a disparate impact upon the older workers, the selection device of the older workers.

QUESTION: Are you saying reductions in force are always practices that if they have a disparate impact, give rise to a, an age discrimination claim?

MR. CRABTREE: No, Your Honor, because in virtually every instance where there is reduction in force it will be quite easy for the employer to satisfy the defense under the reasonable factors of the age provision of the act.

QUESTION: What is different about the reduction in force in this case?

MR. CRABTREE: Well, in this case, Your Honor, as the district court acknowledged in its opinion that we are proceeding from, we had evidence that the highest levels that the decision to undertake the downsizing was actually a decision to get rid of, intended to get rid of older workers.

QUESTION: That's the disparate treatment claim?

MR. CRABTREE: Unfortunately, it's not, Your Honor, because as the district court judge acknowledged, we could not make a disparate treatment case under these facts because in the disparate treatment case, we would still have to prove, unless we could make a cat's paw analysis that the actual decision maker harbored an animus against the employee that's terminated. But we are suggesting under this model and under this framework is that if we can make a prima facie I can't case of disparate impact, then the employer can justify that impact by showing that its decision was based upon reasonable factors and that those reasonable factors—

QUESTION: But this is what I—excuse me for interrupting, but is it the decision to downsize that it has to be reasonable or the particular discharge decisions on each individual have to be reasonable?

MR. CRABTREE: We have identified in this case the action of the employer as being the decision to downsize itself.

QUESTION: The decision to downsize itself?

MR. CRABTREE: Which for most instances will be much more difficult probably for plaintiffs than it would be if you want on a more micro-level. However—

QUESTION: Why would it be more difficult? All I have to prove if I understand your theory is that there are more older workers in the group that were discharged than younger workers?

MR. CRABTREE: Will, it would have to be a substantially disparate impact between the two groups. It would be more difficult because it would be much easier for an employer to justify a reduction in force in almost any circumstance.

QUESTION: I thought you conceded that it was not enough for you to show disparate impact. That you had, say 70 percent of the people and my problem with your presentation is the same as Justice Stevens. In every disparate impact case that I know, a rule neutral is on its face that disparate impact like the high school diploma requirement in Griggs, there is the standard that has a differential effect. A high school diploma, a pen and paper test as in Washington v. Davis, a height, weight requirement as in Dothard vs. Rawlinson, but you don't come to us with any rule, standard, practice. You just say reduction in force.

MR. CRABTREE: Well, what we are saying is this, is that the Court indicated in Wards Cove that the plaintiff in an age—in a discrimination case is to identify a specific practice or action by an employer that results in disparate impact that cannot be justified. We have identified this downsizing as being such a practice because we don't believe the employer can justify because the downsizing was motivated by desire to—

QUESTION: Why don't we leave motive out of it for purposes—forget motive. Let's imagine in your case, that's what I thought this case was about, we imagine in your case the employer had a wonderful motive. There are other cases where the rule in question was we are going to fire some

tenured teachers to save money. That was the real reason to save money. The tenured teachers tend to be older teachers. There was another case in which they said the court looked at a rule that said we will fire people in the higher-paid positions. That was their real reason to save money.

But the court said each of those rules like your case, too, has a disparate impact on older employees. And just saving money is not a justification and therefore the plaintiff wins. Now, I take it that's the proposition you are defending.

MR. CRABTREE: We are defending that proposition. That's correct.

* * *

QUESTION: But as—may I go back to the question that we opened with, and that is I don't know of any case under Title VII where someone could just say reduction in force affected more women than men, therefore, I have an impact case or reduction in force, it affected more minorities than majorities so therefore. It's always been some specific practice that you could identify some rule, some neutral rule. In fact, it's even sometimes referred to as neutralized base discriminatory and impact.

Here I don't—reduction of force in and of itself is not such a neutral rule. It's—it's too general. So I, what is the precise rule practice standard that's comparable to a high school diploma, a height and weight. What is there in this case?

MR. CRABTREE: Your Honor, two answers. First of all, that we equate reduction in force to a test. It's a selection process. We are not challenging a question on the test. We are challenging the test itself. But even if the court were to find that we have inadequately identified the action of the employer that should be subject to disparate impact analysis, we would still, it's an interlocutory proceeding. We would be happy to proceed on the theory as the court redefines or the court defines disparate impact under the ADEA. We would amend our complaint in accordance with the court's ruling.

QUESTION: I don't think that the district court finding allows you to say the standard, the standard is the reduction itself because the district judge said that the people involved held a wide variety of jobs, were managed and supervised by different people and were terminated at different times by different decision makers based on different considerations of criteria, and that seems to me just wholly to reject that there is a rule or a standard.

MR. CRABTREE: The reason why we believe it's important to be able to do the analysis with the reduction of force being the action is because otherwise it would allow an employer to purposely choose to do a reduction in force to get rid of its older workers where there is a corporate culture pervaded by ageism and have consequences as it did here where it greatly reduced the age of its work force.

QUESTION: What is your closest precedent under Title VII dealing with race or dealing with sex where you have something so groundly general as a reduction in force with different decisions, different standards, different times?

MR. CRABTREE: There are cases dealing with reduction of force under Title VII. There is one NAACP vs. Medical Center, Inc., It was out of the third circuit. 657 F.2d 1322. There have probably been others.

QUESTION: And nothing more specific than a reduction in force?

MR. CRABTREE: Candidly, Justice Ginsburg, I don't recall.

* * * *

APPENDIX B — EXCERPTS FROM JUNE 1965 REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964: THE OLDER AMERICAN WORKER – AGE DISCRIMINATION IN EMPLOYMENT

* * *

Factors Which Might Tend to Result in Discrimination in Employment Because of Age

Older workers are in general valued and often prized employees. Almost 97 percent of male workers 45 and over were employed in 1964. Persons over 45 make up almost 40 percent of the U.S. labor force, but only 27 percent of total unemployment, and only 17 percent of all the applicants registered at the public employment service offices. Most older workers who are not at retirement age do get reemployed when they lose jobs.

There is, nevertheless, clear evidence of the Nation's waste today of a wealth of human resources that could be contributed by hundreds of thousands of older workers, and of the needless denial to these workers of opportunity for that useful activity which constitutes much of life's meaning.

The central element identifiable in this situation is the fact of sluggish human adjustment and impersonal economic accommodation to the present rapid pace of scientific and technological progress.

These findings analyze the extent to which older workers are deprived of useful and profitable activity as a result of

each of the four types of discrimination described in the Introduction to this report.

As has already been indicated in the Introduction, we find no significant evidence of the first kind of discrimination—that which is based on the kind of dislike or intolerance that sometimes exists in the case of race, color, religion, or national origin, and which is based on considerations entirely unrelated to ability to perform a job.

We do find substantial evidence of arbitrary practice in the second category of discrimination—discrimination based on unsupported general assumptions about the effect of age on ability—in hiring practices that take the form of specific age limits applied to older workers as a group.

We find that in the third category, which involves decisions made about aging and the ability to perform in individual cases, there may or may not be arbitrary discrimination on the basis of age, depending on the individual circumstances.

Individual circumstances may similarly lead to arbitrary discrimination in the fourth category, that involving institutional arrangements which operate indirectly to restrict the employment of older workers.

A. Discrimination Arising from Dislike or Intolerance

Discrimination in employment based on race, religion, color, or national origin is accompanied by and often has its origins in prejudices that originate outside the sphere of

employment. There are no such prejudices in American life which apply to older persons and which would carry over so strongly into the sphere of employment.

The process of aging is inescapable, affecting everyone who lives long enough. It is gradual, minimizing and obscuring differences among people. At all times there are people of all ages living in close association rather than in separate and distinct social or economic environments. The element of intolerance, of such overriding importance in the case of attitudes toward other groups, assumes minimal importance in the case of older people and older workers.

It is true that hiring officials are not immune to the brightness, vigor, and attraction of youth, nor always above exploiting these attributes for commercial advantage. But such choices involve preferences *for* one group, rather than antagonism *against* another.

We have found no evidence of prejudice based on dislike or intolerance of the older worker. The issue of discrimination revolves around the nature of the work and its rewards, in relation to the ability or presumed ability of people at various ages, rather than around the people as such. This issue thus differs greatly from the primary one involved in discrimination on the basis of race, color, religion, or national origin, which is basically unrelated to ability to perform work.

This is not to say that there is no intolerant prejudice against older persons as such. Determinations not to employ older workers can become deep-seated and even emotional

in character. But were this the sole matter, the degree to which it exists would not warrant public concern.

* * *

C. The Necessary Recognition of Forces of Circumstance

Consideration has been given in the preceding section to the arbitrariness of specific age limitations, indiscriminately applied. It is equally important to recognize the force of certain circumstances which unquestionably affect older workers more strongly, as a group, than they do younger workers.

* * *

III. Conclusions and Recommendations

It would be the worst misfortune if the problem of age discrimination in employment, having come to the Congress' attention, were posed so narrowly as to result in superficial prescription.

The firmest conclusion from this year long study is that the most serious barriers to the employment of older workers are erected on just enough basis of fact to make it futile as public policy, and even contrary to the public interest, to conceive of all age restrictions as "arbitrary" and to concentrate on the prohibition of practices which include this element.

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A larger, more informed effort is required.

To the extent that arbitrary discrimination occurs, it can and should be stopped.

To the extent that obstacles exist to the employment of older workers because of limitations in their abilities, these abilities must be enlarged.

To the extent that the process of matching men and jobs is working to the disadvantage of older workers, the process must be improved.

To the extent that employment security and income maintenance programs are having a wholly unintended adverse effect on the position of older workers who are unemployed, these programs must be adjusted.

All these things are possible, given a national will and a national effort.

Such an effort will include four types of programs.

First: *Action* to eliminate arbitrary age discrimination in employment.

Second: *Action* to adjust institutional arrangements which work to the disadvantage of older workers.

Third: *Action* to increase the availability of work for

older workers.

Fourth: *Action* to enlarge educational concepts and institutions to meet the needs and opportunities of older age.

These recommendations are made pursuant to a Congressional directive that a study be carried out and that the Secretary of Labor report the results of such study and "include in such report such recommendations for legislation to prevent arbitrary discrimination in employment because of age as he determines advisable." These recommendations derive only from the directive and the study. They do not constitute proposals by the Administration. Their ultimate consideration will necessarily be as part of a broader balancing with other important measures involving other needs.

Action to Eliminate Arbitrary Age Discrimination in Employment

There is persistent and widespread use of age limits in hiring that in a great many cases can be attributed only to arbitrary discrimination against older workers on the basis of age and regardless of ability. The use of these age limits continues despite years of effort to reduce this type of discrimination through studies, information and general education undertaken by the Federal Government and many States, as well as by nonprofit and employer and labor organizations.

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The possibility of new *nonstatutory* means of dealing with such arbitrary discrimination has been explored. That area is barren.

State experience with statutes prohibiting discrimination in employment on the basis of age indicates that such practice can be reduced by a well-administered and well-enforced statute, coupled with an educational program. It is clear from this experience that an educational program to promote hiring on the basis of individual merit is far more effective when provided for by statute.

The elimination of arbitrary age limits on employment will proceed much more rapidly if the Federal Government declares, clearly and unequivocally, and implements so far as is practicable, a national policy with respect to hiring on the basis of ability rather than age.

Such implementation should emphasize the role to be played by persuasion and education, both in general and in individual cases of alleged violations of policy, and should provide for action in the event that persuasion and education fail.

Specific provision should be made for handling instances of *alleged* arbitrary discrimination where the facts of the case indicate that the older worker in question needs reeducation, training, counseling, or health and other services. In these cases, the individual should be referred to the appropriate programs for needed assistance.

While State laws have been increasing in number, some are not implemented at all, and, with few exceptions, the

Appendix B

State resources have been inadequate for assuring effective compliance. Activities on behalf of older workers have had a tendency to become submerged in broader programs to prevent discrimination on account of race, color, or religion.

A clear-cut and implemented Federal policy against arbitrary discrimination in employment on the basis of age would provide a foundation for a much needed vigorous, nationwide campaign to promote hiring on the basis of ability rather than age.

Action to Adjust Institutional Arrangements Which Work to the Disadvantage of Older Workers

To eliminate discrimination in the employment of older workers, it will be necessary not only to deal with overt acts of discrimination, but also to adjust those present employment practices which quite unintentionally lead to age limits in hiring.

* * * *

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No. 03-349

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In The
Supreme Court of the United States

JACK THWEATT,
on behalf of himself and all others similarly situated,

Petitioner,

v.

ELECTRONIC DATA SYSTEMS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY MEMORANDUM

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4

I. THIS CASE PRESENTS AN OUTSTANDING VEHICLE FOR RESOLVING THE CIRCUIT SPLIT.

EDS tries to shoehorn this case into *Adams v. Florida Power*, 255 F.3d 1322 (CA11 2001), *cert. dismissed as improvidently granted*, 535 U.S. 228 (2002), claiming that the petitioner has failed to identify a specific employment practice causing the disparate impact he alleges. (Indeed, most of EDS's response is lifted directly from Florida Power's certiorari response in the *Adams* case.) But unlike the bottom-line challenge in *Adams*—in which the petitioners simply challenged the statistical end result of a reduction-in-force—the petitioner in this case has challenged EDS's ranking *process*, which the company used as part of a reduction-in-force. And the petitioner has identified the precise components within that process that caused it to be wholly arbitrary. Pet., pp. 9-11.

II. THE CONFLICT IN THE CIRCUITS IS NOT GOING AWAY.

As EDS correctly observes, "[a]fter *Hazen Paper* [*Co. v. Biggins*, 507 U.S. 604 (1993)], three circuits — the Second, the Eighth and the Ninth — have continued to recognize disparate impact claims under the ADEA." Brief in Opp., p. 14. With the Fifth Circuit's recent decision in *Smith v. City of Jackson*, __ F.3d __, 2003 WL 22671061 (CA5 Nov. 13, 2003), five circuits have declined to recognize such claims. EDS nonetheless claims that the 5-3 circuit split does not present an important issue for this Court because the pro-disparate impact circuits have not "analyzed *anew* whether such claims are properly recognized" after *Hazen Paper*. Brief in Opp., p. 14 (emphasis added). The company concedes, however, that those

circuits have "chosen" to follow their pre-*Hazen Paper* precedent. *Ibid.* There is no need for further analysis where a circuit court is not breaking from its established precedent,[1] and the Second, the Eighth, and the Ninth circuits have elected to adhere to their precedent. With the passing of the ten-year anniversary of *Hazen Paper*, it is clear that the circuit conflict is not going to be resolved until this Court intervenes.

III. THE COURT OF APPEALS' RULING UNDERSCORES THE NEED FOR REVIEW.

The petition briefly explains why the Eleventh Circuit's decision is erroneous. Pet., pp. 14-19. EDS responds that the decision is correct. Brief in Opp., pp. 16-27. The petition and the response reveal the parties' drastically different understandings of the law. If the Court grants review, there will be time enough to reply to EDS's arguments in detail. For present purposes, however, the depth of the parties' disagreement on the merits—which mirrors

[1] This is precisely why the Eleventh Circuit's opinion is unpublished in this case. Pet., pp. 2a-3a.

the deep division among the circuits—only underscores the need for review.

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PETITION FOR REHEARING

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PETITION FOR REHEARING

The petitioner moves the Court to hold this petition for rehearing until the Court decides whether to grant certiorari in *Smith v. City of Jackson* and, if certiorari is granted in *Smith*, to grant rehearing and dispose of this case in accordance with the Court's decision in *Smith*.

THE PLAINTIFFS IN *SMITH V. CITY OF JACKSON* WILL SOON BE PETITIONING THIS COURT FOR A WRIT OF CERTIORARI.

On November 13, 2003, the Fifth Circuit issued its decision in *Smith v. City of Jackson*, __ F.3d __, 2003 WL 22671061 (CA5 Nov. 13, 2003), a case addressing the same issue presented in this case: whether disparate impact claims should be permitted under the ADEA. With the *Smith* decision, there is now a 5-3 split in the circuits on that important federal question. Counsel of record in this case has learned that the plaintiffs in *Smith* will soon be filing a petition for a writ of certiorari. Although the Court has issued an order denying review of the Eleventh Circuit's unpublished decision in this case, the Court may decide to accept review in *Smith* because the published decision in that case arises in a far more factually developed context and provides a substantial analysis of the disparate impact question presented in both cases.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for a writ of certiorari, the petitioner prays that the Court will hold this petition for rehearing until the Court disposes of the *Smith* petition, and then grant rehearing and dispose of this case in accordance with the decision in *Smith* if certiorari is granted in that case.

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December 29, 2003

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

_____